95-457 (4)

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

CESAR A. PERALES, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 253, 254, 255
Dockets 91-6133, 91-6135 and 91-6167

CESAR A. PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK; STATE OF NEW YORK; CITY OF NEW YORK; SARA DOE; JANE ROE; ANNE COE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-APPELLANTS,

FRAN FOE; MARY MOE; LINDA LOE; SUSAN SOE; ZELDA ZOE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-INTERVENORS-APPELLANTS,

v.

JANET RENO, AS ATTORNEY GENERAL OF THE UNITED STATES; TERRANCE O'REILLY, AS ASSISTANT COMMISSIONER FOR ADMINISTRATIVE APPEALS UNIT OF THE IMMIGRATION AND NATURALIZATION SERVICE; WILLIAM R. YATES, AS EASTERN SERVICE CENTER DIRECTOR OF THE INS EASTERN DIVISION; WILLIAM S. SLATTERY, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT; DONNA E. SHALALA, AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES.

Argued May 24, 1994

Decided Feb. 8, 1995

Before: CARDAMONE, WALKER and McLAUGHLIN, *Circuit Judges.*

Reconsideration of prior appeal, 967 F.2d 798 (2d Cir. 1992), after remand from the United States Supreme Court, in order to address that part of the judgment of the United States District Court for the Southern District of New York, 762 F. Supp. 1036 (S.D.N.Y. 1991) (Conboy, *J.*), which held that the Immigration and Naturalization Service complied with its duties under the Immigration Reform and Control Act of 1986 and the Due Process Clause of the Fifth Amendment to "broadly disseminate" accurate information regarding an amnesty legalization program for illegal aliens.

Affirmed in part and remanded in part. Judge Cardamone dissents in a separate opinion.

WALKER, *Circuit Judge*:

This class action was brought to challenge the Immigration and Naturalization Service's administration of the amnesty program for eligible illegal aliens authorized by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 et seq. Plaintiffs alleged that the agency's regulations implementing the statutory exclusion of aliens "likely at any time to become a public charge" were facially invalid, *see* 8 U.S.C. § 1182(a)(4) (Supp. II 1990); that the agency failed to "broadly disseminate" eligibility criteria and to sponsor a twelve-month application period as required by IRCA, *see* 8 U.S.C. § 1255a(i); and that the agency violated the class members'

due process rights under the Fifth Amendment. In a previous opinion, we held that the "public charge" regulations violated IRCA and therefore did not address plaintiffs' arguments as to the INS's dissemination policies or alleged due process violations. *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir.1992). The Supreme Court subsequently vacated our decision and remanded for further consideration in light of *Reno v. Catholic Social Services*, --- U.S. ----, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) ("CSS ").

Although we initially remanded this case to the district court for further consideration of the facial validity challenge in light of CSS, *Perales v. Thornburgh*, 4 F.3d 99 (2d Cir.1992), both parties petitioned for us to recall our mandate and rule on that part of the former appeal that was not addressed in our prior opinion. We granted their petitions and now hold that the INS complied with its duties under IRCA and the Due Process Clause of the Fifth Amendment to disseminate accurate information broadly regarding the amnesty legalization program and to sponsor a twelve-month application period. Accordingly, we affirm that part of the district court's judgment that reached a similar conclusion and reissue our remand for further consideration of the plaintiffs' challenge to the validity of the public charge regulations.

BACKGROUND

The amnesty program established by IRCA was developed as a one-time opportunity to legalize "undocumented aliens who, over the years, had shown their capacity to be contributing members of society" but who had not obtained legal status during their residency. 967 F.2d at 801. It was instituted at the same time that Congress "undercut the incentives for illegal immigration by sanctioning employers who hire undocumented workers." *Id.* Our previous opinion in this case set forth the necessary background regarding the provisions of the amnesty program and the INS's adoption and development of the

public charge regulations at issue. Because our current decision relies on the same record, we think it appropriate to set forth the relevant sections of our previous background section here. They are as follows:

A. *The Amnesty Provisions.*

Amnesty [under IRCA] was to take place in two stages. During a twelve- month period beginning "on a date ... designated by the Attorney General" and later established by regulation as May 5, 1987 through May 4, 1988 (the "application period"), illegal aliens could apply to the INS for temporary resident status. 8 U.S.C. § 1255a(a)(1) (1988). The second stage, to commence nineteen months after the receipt of temporary resident status, gave aliens one year, later extended to two, see Pub.L. No. 101-649, § 703(a), 104 Stat. 4978, 5086 (1990), in which to apply for permanent resident status. 8 U.S.C. § 1255a(b)(1)(A), 2(C) (1988 & Supp. II 1990). Aliens could tender their applications to the INS or to Qualified Designated Entities ("QDEs"), nongovernmental agencies enlisted to serve as "buffers" between aliens and the government. *See* 8 U.S.C. § 1255a(c)(1) (1988). IRCA further required the INS, in conjunction with the QDEs, to "broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits." 8 U.S.C. § 1255a(i) (1988).

IRCA conditioned adjustment to temporary resident status on the meeting of four broad eligibility requirements. Sections 1255a(a)(1)-(4) mandated the Attorney General to grant this adjustment of status where the applicant: (1) had filed a timely application; (2) had maintained continuous unlawful residence since 1982; (3) had maintained a continuous physical presence since November 6, 1986; and (4) was "admissible to the United States as an immigrant." 8 U.S.C. § 1255a(a)(1)-(4) (1988).

The current appeal centers on the fourth criterion: admissibility as an immigrant. To show that she was "admissible ... as an immigrant," 8 U.S.C. § 1255a(a)(4) (1988), an alien had to establish, inter alia, that she was not inadmissible under 8 U.S.C. § 1182(a)(4) (Supp. II 1990) pursuant to which "[a]ny alien who, in the opinion of the ... Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable." IRCA's "Special Rule for Determination of Public Charge" (the "statutory special rule") limited the agency's broad discretion in this area, stating that an alien "is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(4) of this title [relating to the public charge determination] if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). In a separate provision, IRCA authorized the Attorney General to waive "in the case of individual aliens" any of the excludability provisions of § 1182(a), including the public charge provision, "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1255a(d)(2)(B)(i).

B. *The INS' May 1, 1987 Public Charge Regulations.*

Pursuant to these provisions, the INS promulgated final regulations on May 1, 1987, 52 Fed.Reg. 16,205 et seq. (1987) (codified as amended at 8 C.F.R. § 245a (1992)). The INS broke the statutory amnesty scheme down into three parts. First, the agency's "Proof of financial responsibility" regulation mirrored the statutory language by providing that "[a]n applicant for adjustment of status ... [is] likely to become [a] public charge[ ] unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 52 Fed.Reg. 16,211 (1987) (codified as

amended at 8 C.F.R. § 245a.2(d)(4) (1992)).[1] Integral to this provision was the regulation's definition of "public cash assistance" as "income or needs-based monetary assistance ... received by the alien or his or her immediate family members through federal, state or local programs designed to meet subsistence levels." 52 Fed.Reg. 16,209 (1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992)).[2] The

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1 The provision stated:

(4) Proof of financial responsibility. An applicant for adjustment ofstatus under this part is subject to the provisions of section 212(a)(15)of the Act relating to excludability of aliens likely to become publiccharges unless the applicant demonstrates a history of employment in theUnited States evidencing self-support without receipt of public cashassistance. Generally, the evidence of employment submitted underparagraph (d)(3)(i) of this section will serve to demonstrate the alien'sfinancial responsibility during the documented period(s) of employment. Ifthe alien's period(s) of residence in the United States include significantgaps in employment or if there is reason to believe that the alien may havereceived public assistance while employed, the alien may be required toprovide proof that he or she has not received public cash assistance. Anapplicant for residence who is likely to become a public charge will bedenied adjustment.

2 This provision stated in full:

"Public cash assistance" means income or needs-based monetary assistance,to include but not limited to supplemental security income, received by thealien or his or her immediate family members through federal, state, orlocal programs designed to meet subsistence levels. It does not includeassistance in kind, such as food stamps, public housing, or other non-cashbenefits, nor does it include work-related compensation or certain types ofmedical assistance (Medicare, Medicaid, emergency treatment, services topregnant women or children under 18 years of age, or

third element, entitled "Special Rule for Determination of Public Charge" (the "regulatory special rule") provided in relevant part that "[a]n alien who has a consistent employment history which shows the ability to support himself and his or her family ... may be admissible" through a discretionary waiver from the Attorney General. 52 Fed.Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (1992)).[3]

C. *Developments in INS Policy.*

Prior to the issuance of the May 1, 1987 regulations, groups representing aliens had commented that the

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treatment in theinterest of public health). 52 Fed.Reg. 16209 (1987).

3 The regulatory special rule provides that:

(4) Special rule for determination of public charge. An alien who has aconsistent employment history which shows the ability to support himselfand his or her family, even though his income may be below the povertylevel, may be admissible under paragraph (k)(2) of this section [providingfor waivers for humanitarian purposes, to assure family unity, or when inthe public interest]. The alien's employment history need not becontinuous in that it is uninterrupted. It should be continuous in thesense that the alien shall be regularly attached to the workforce, has anincome over a substantial period of the applicable time, and hasdemonstrated the capacity to exist on his or her income and maintain his orher family without recourse to public cash assistance. This regulation isprospective in that the Service shall determine, based on the alien'shistory, whether he or she is likely to become a public charge. Pastacceptance of public cash assistance within a history of consistentemployment will enter into this decision. The weight given in consideringapplicability of the public charge provisions will depend on many factors,but the length of time an applicant has received public cash assistancewill constitute a significant factor. 52 Fed.Reg. 16,212 (1987).

proposed public charge regulations unlawfully conditioned a showing of self-support upon the non-receipt of public assistance by family members. Just over four months into the application period, the INS began a series of "clarifications" and amendments of the public charge provisions. A September 23, 1987 memorandum from Associate Commissioner Norton to the four regional commissioners removed the regulatory special rule's waiver requirement, stating that "[n]o waiver application is necessary to apply the special rule for determination of public charge." Commissioner Norton repeated this instruction in an October 1, 1987 letter to Edward J. Wildblood, the Regional Legalization Officer of the Eastern Regional Office. On November 17, 1987, the INS formalized this policy, issuing a technical amendment that deleted the waiver requirement from its special rule. 52 Fed.Reg. 43,843 (Nov. 17, 1987) (codified at 8 C.F.R. § 245a.2(k)(4) (1992)).

The INS also revised its definition of "public cash assistance." A November 23, 1987 memorandum from Commissioner Norton to the four regional commissioners explained that "SSI [Supplemental Security Income] should be considered as public cash assistance only with regard to the person who receives it. SSI should not be attributed as public cash assistance to the immediate family members who reside with the recipient, but who themselves are non-recipients." The agency's position with respect to Aid to Families with Dependent Children (AFDC) developed more slowly. A December 9, 1987 memorandum from Paul Virtue, INS General Counsel, to Terry O'Reilly, Deputy Assistant Commissioner for Legalization, explained that

> if a family of three applied for AFDC and the parents were both ineligible aliens the benefit would still be granted to the United States Citizen child and that the child is considered the recipient.... For our purposes, it would seem to me that the parents

> in such a situation would not be considered to have received "public cash assistance".

In a February 12, 1988 letter responding to questions from a District of Columbia Official, Assistant Commissioner William Slattery indicated that "[p]ublic charge status is not conveyed to the parent-payee if the United States citizen child is the recipient [of AFDC]." Finally, on April 21, 1988, just two weeks before the close of the application period, Commissioner Norton adopted this position in a memorandum to the four Regional Commissioners:

> As a general rule, the receipt of AFDC benefits by a member of the legalization applicant's family is not attributed to the applicant for purposes of determining the likelihood that the applicant will become a public charge.... If, however, the family is reliant on the AFDC benefits as its sole means of support, the legalization applicant may be considered to have received public cash assistance. This determination must be made on a case-by-case basis and upon consideration of the totality of the applicant's circumstances.

Following the May 4, 1988 close of the application period, in a written decision dated December 29, 1988, Commissioner Norton broadened the April 21, 1988 position. He held that even a non-working applicant whose children had received public cash assistance would not be excludable as likely to become a public charge, since

> [i]t is not unusual for a mother to stay at home to care for her children, especially when the children have not started school. A mother's absence from the work force to care for her children is not by itself sufficient basis to find the mother likely to become a public charge.

Matter of A., Interim Decision No. 3097 at 4 (Imm. Nat. Serv. Dec. 29, 1988). Finally, in July of 1989, more than one year after the May 5, 1988 application cutoff date, the INS formally amended its regulatory definition of "public cash assistance" to delete all reference to the alien's immediate family members. The Federal Register notice explained that "[t]he receipt of public cash assistance by immediate family members will not have a bearing on an applicant's eligibility for legalization." 54 Fed.Reg. 29,442, 29,443 (1989).

The July 1989 amendments also removed from the regulatory special rule references to an alien applicant's family. From that point on "an applicant need[ed] only [to] demonstrate a consistent employment history that shows the ability to support himself or herself." *Id.* at 29,443-44.

967 F.2d at 801-04. Because a full recitation of the procedural history of this litigation is not necessary to our current decision, we briefly summarize only the central events in this lawsuit. Our prior opinion contains a more complete description. 967 F.2d at 804-05.

This lawsuit was commenced on April 1, 1988 by the State of New York, the City of New York, and a class of plaintiffs later certified as[a]ll undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R. §§ 245a.1(i), 245a.2(d)(4) and 245a.2(k)(4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not limited to those individuals who were deterred from filing applications for legalization under the Legalization program.

Plaintiffs asserted that the public charge regulations facially violated IRCA, the Fifth Amendment's Equal Protection Clause, and the Administrative Procedure Act's

proscription against arbitrary and capricious action because they included consideration of public assistance by an alien's family members in determining whether the alien herself was self-supporting. Plaintiffs further alleged that the INS failed to "broadly disseminate" complete and accurate information regarding the public charge regulations and that this failure violated the class members' due process rights and the INS's duty to administer a full twelve-month application period. See 8 U.S.C. §§ 1255a(a), 1255a(i).

In early April, 1988, plaintiffs applied for a temporary restraining order directing the INS to disseminate its revised policy that a child's receipt of public cash assistance does not convey public charge status to the parent. The district court denied the application based on the INS's assertion that it would disseminate new instructions on this issue, which it did through the April 21, 1988 memorandum to the four regional commissioners referenced above. Dissatisfied with this action, plaintiffs immediately applied for a preliminary injunction to extend the application period, which the district court denied. We subsequently affirmed this denial. *Perales v. Meese*, 847 F.2d 55 (2d Cir.1988).

On March 29, 1989, the district court denied the parties' cross-motions for partial summary judgment. Upon plaintiffs' filing of a motion for reargument, the parties entered into a Stipulation and Order, filed July 21, 1989, which required defendants to publish amended regulations deleting the references to family members from the definition of public cash assistance and from the regulatory special rule and to readjudicate all timely filed applications that had been denied on public charge grounds. The INS thereupon issued the July, 1989 amendments discussed above and readjudicated the pertinent applications, approving all but one.

After holding a six-day bench trial, the district court issued the opinion currently under review, which held that the INS public charge regulations were neither facially

invalid nor unlawful as applied. *Perales v. Thornburgh*, 762 F.Supp. 1036, 1061 (S.D.N.Y.1991). The district court also rejected plaintiffs' claim that the INS disseminated misinformation concerning the public charge regulations in violation of IRCA and the Fifth Amendment's Due Process Clause. *Id.* at 1064-65.

On appeal, we held that the public charge regulations violated IRCA for two reasons: the regulatory special rule required an applicant to demonstrate the ability to support her family as well as herself and further required an applicant who satisfied the regulatory special rule to apply for a discretionary waiver from the Attorney General. 967 F.2d at 808-10. We found that there was no support in IRCA for either requirement. Under the statute, an applicant needed only to demonstrate evidence of self-support to satisfy the statutory special rule and, upon doing so, was exempt from public charge excludability without having to undergo an additional waiver process. We ordered the INS to disseminate information regarding the effect of our decision and to sponsor a new twelve-month application period for class members who had been dissuaded from applying for amnesty during the original application period because of the unlawful regulations. *Id.* at 813-14. Given this holding, it was unnecessary for us to address plaintiffs' dissemination and due process claims.

In June, 1993, the Supreme Court vacated our opinion and remanded the case for further consideration in light of CSS. *Reno v. Perales*, --- U.S. ----, 113 S.Ct. 3027, 125 L.Ed.2d 716 (1993). CSS held that aliens challenging regulations promulgated pursuant to IRCA (in that case, regulations regarding the "continuous residence" and "continuous physical presence" requirements) were required to show that their claims were ripe by demonstrating that they had taken every affirmative step possible in applying for legalization but were blocked because of the challenged regulations. The Court reasoned that because there were

several criteria for determining whether an alien would be eligible for legalization, the plaintiffs could not show that they were "concretely affected" by the challenged regulations unless their applications had been denied "by virtue of the [challenged] rule, and not by virtue of some other, unchallenged rule." CSS, --- U.S. at ---- n. 19, 113 S.Ct. at 2496 n. 19 (quotation marks omitted). Plaintiffs who could demonstrate that their applications were denied because of the rule would then be subject to IRCA's exclusive review provisions; as such, these plaintiffs could only raise their challenge to the questioned regulations as part of an appeal from an order of deportation.

The Court recognized an exception to this scheme of review for aliens who could show that they were "front-desked" by INS officials--i.e., whose applications were rejected at INS offices on the basis that they were statutorily ineligible for legalization--or who could show that even though they were not front-desked, "the front-desking policy was nevertheless a substantial cause of their failure ... to apply." CSS, --- U.S. at ---- n. 28, 113 S.Ct. at 2500 n. 28. The Court observed that these aliens would have ripe claims because they would have felt the regulations' effects concretely. Furthermore, they would be able to maintain an action in the district court because they would not come under IRCA's exclusive review procedures, which applied only to aliens whose applications had been denied in an administrative proceeding. Because the record was unclear as to whether any of the plaintiffs had been subjected to front-desking, the Court remanded for further factual findings.

When this case was remanded to this court, we in turn remanded it to the district court for a determination as to which, if any, of the plaintiff class members were front-desked or could otherwise show that the challenged regulations applied to them " 'in a sufficiently concrete manner to satisfy ripeness concerns.' " 4 F.3d at 100

(quoting *CSS*, --- U.S. at ---- n. 28, 113 S.Ct. at 2500 n. 28). The parties subsequently petitioned for us to recall this mandate and to decide the questions we had not addressed in our first opinion. We granted their petitions and now proceed to rule on the merits of plaintiffs' unresolved claims.

DISCUSSION

Plaintiffs assert three allegedly "procedural" claims which they argue are plainly ripe, are substantiated by the existing record, and warrant reinstatement of the relief ordered in our previous decision. Specifically, plaintiffs claim that the INS violated (a) its statutory duty to disseminate accurate eligibility information pursuant to 8 U.S.C. § 1255a(i); (b) its statutory duty to administer a 12-month application period pursuant to 8 U.S.C. § 1255a(a); and (c) the Due Process Clause of the Fifth Amendment.

A. *Ripeness*

In their briefing to this court, plaintiffs have presented two distinct formulations of their procedural claims. The first formulation asserts that the INS disseminated unlawful eligibility requirements insofar as their substance contravened the statutory mandates of IRCA; the second asserts that the INS disseminated inaccurate eligibility requirements insofar as the information communicated contravened the actual practices INS agents followed when processing applications. We believe that the first formulation of plaintiffs' procedural claims is not ripe for review in light of *CSS*. Although *CSS* did not specifically address a dissemination or due process claim, the Court's overriding principle that there can be no pre-enforcement challenges to the validity of a regulation applies with equal force to a dissemination challenge that turns upon a determination of a regulation's validity. In other words, plaintiffs cannot escape the reach of *CSS* by shifting their attack against the substance of the public charge regulations from the point when the INS promulgated them to the point

when the INS disseminated them or the eligible aliens received them.

Plaintiffs seek to distinguish *CSS* on the grounds that the plaintiffs in *CSS* sought to enforce the INS's duty to adjudicate applications, whereas the class members in this case seek to enforce the INS's duty to disseminate accurate information. This argument is unavailing. Plaintiffs essentially assert a right to have disseminated to them only regulations that have been declared valid vis-a-vis the statute. However, neither IRCA nor the Due Process Clause gives rise to such a right. To hold otherwise would mean that potential applicants of any government program would be entitled to a court ruling on the validity of an agency's implementing regulations upon their mere dissemination and before the regulations were even enforced. Such a pre-enforcement ruling is exactly what *CSS* forbids.

By contrast, plaintiffs' second formulation of their procedural claims is ripe for adjudication. In essence, plaintiffs allege that the INS "publicized eligibility restrictions that it later jettisoned, and then failed to disseminate the changed eligibility standards," with the result that many eligible aliens were deterred from applying. These claims are not barred by *CSS* because they do not require a decision as to whether the substance of the INS's policies accord with the statute. They require only a determination regarding whether the information disseminated by the INS accorded with the practices it utilized for processing applications. As a result, the claim here is distinguishable from *CSS*. This claim is ripe because the plaintiffs allege that the agency failed to notify potential applicants of a change in the criteria for amnesty, thus deterring them from applying for amnesty. Consequently, the plaintiffs are challenging the lack of adequate notice rather than the substance of the policies.

The CSS Court hints at this distinction in a footnote, noting that the "end of the application period may mean

that the plaintiffs no longer have an opportunity to take the steps that could make their claims ripe; but this fact is significant only for those plaintiffs who can claim that the Government prevented them from filing a timely application." --- U.S. at ---- n. 20, 113 S.Ct. at 2497 n. 20. While the Court was probably referring to plaintiffs who were front-desked, the latter clause also encompasses plaintiffs who were prevented from filing a timely application because they did not receive proper notice of the application criteria. Such claims were not ripe as long as the application period was open. Once that period closed, however, the claim became ripe because the plaintiffs were left with no opportunity to apply for amnesty. Thus, we hold that the challenge to the INS's failure to broadly disseminate changes in the eligibility requirements constitutes a ripe claim.

B. *Due Process Claim*

We thus turn to the merits of plaintiffs' more purely procedural claims. As an initial point, we note that the standards for judging plaintiffs' claims are not well defined. IRCA provides simply that the INS must "broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits." 8 U.S.C. § 1255a(i). The Fifth Amendment requires that no person be deprived of life, liberty, or property without due process of law. For purposes of our discussion, we assume that plaintiff class members have a protected interest in receiving amnesty based on IRCA's mandatory language that the Attorney General "shall" grant eligible aliens legalized status. *See Perales*, 762 F.Supp. at 1063-64; *see also McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 491, 111 S.Ct. 888, 895, 112 L.Ed.2d 1005 (1991) (the impact of a denial of legalization under special agricultural workers program is "plainly sufficient to mandate constitutionally fair procedures in the application process"); *cf. Holmes v. New York City Hous.*

Auth., 398 F.2d 262, 265 (2d Cir.1968) (finding that plaintiffs' complaint stated a claim for relief under the Due Process Clause where applicants for public housing under New York's Public Housing Law alleged deficiencies in the admission policies); *Dealy v. Heckler*, 616 F.Supp. 880, 886 (W.D.Mo.1984) (finding that an applicant for Social Security benefits has a constitutionally protected property interest).

Due process requires that notice for proceedings be "of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) (citations omitted). To determine reasonableness in this context, we must weigh

> the private interest that will be affected by the official action; ... the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

We note that the IRCA requirement of broad dissemination of information regarding "the benefits which aliens may receive ... and the requirements to obtain such benefits," 8 U.S.C. § 1255a(i), coupled with the legislative goal of reaching an uneducated and fearful alien population, sets a more stringent standard than the general due process notice requirements for potential recipients of government benefits. Thus, if the INS complied with its statutory duties

of broad dissemination it also fulfilled its due process obligations.

Plaintiffs argue that the INS's initial regulations led the alien population to believe that a family member's receipt of public assistance would disqualify an applicant, and that the INS never effectively communicated to the alien population the policy statements clarifying this misperception. They further contend that the INS did not broadly disseminate its amendment of the regulatory special rule halfway through the application period, depriving class members of a full twelve months for submitting their applications. While our prior opinion tracked the development of the INS's policies during the application period, we did not decide whether the INS had satisfied its dissemination obligations under IRCA or the Due Process Clause. *See Perales*, 967 F.2d at 802-03. We now hold that the INS's dissemination of information regarding the application process and relevant eligibility standards did not violate the class members' statutory and constitutional rights.

1. *The INS's Policy Regarding Public Cash Assistance*

We turn first to the INS's development of its policy regarding how receipt of public cash assistance would affect an applicant's eligibility for legalization. The INS's initial regulations stated that an applicant was subject to the public charge exclusion "unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 C.F.R. § 245a.2(d)(4) (1988). The regulations defined "public cash assistance" as "income or needs-based monetary assistance to include, but not limited to, supplementary security income received by the alien" or his or her immediate family members. 8 C.F.R. § 245a.1(i). Plaintiffs argue that these regulations created a categorical rule that a family member's receipt of public cash assistance would make an alien ineligible for amnesty. The INS maintains that under these

regulations, an alien might be ineligible for amnesty due to his or her family members' receipt of public assistance, but that each applicant was reviewed on a case-by-case basis and could make a showing of self-support under the regulatory special rule notwithstanding a family member's receipt of public assistance. The district court credited the INS's position, finding that there was no per se rule of automatic disqualification based on a family member's receipt of public assistance. This was a finding of fact, which we review for clear error. Fed.R.Civ.P. 52(a).

Plaintiffs dispute the district court's finding by pointing to the testimony of Richard Berryman, the INS's New York Training Coordinator, who answered affirmatively when asked whether he had trained the legalization personnel in New York and the QDEs in New York that "mere receipt of public cash assistance by a United States citizen child of a legalization applicant at any time after January 1, 1982 per se rendered the parent likely to become a public charge." The INS responds that Berryman also testified that there were no clear-cut rules regarding eligibility, and that public charge waivers were available from the start of the amnesty program. The INS further argues that any misperception Berryman might have communicated was minimal since his last training session was in September, 1987 and the November, 1987 amendment to the regulatory special rule clarified that receipt of welfare by an applicant's family member was not a categorical bar to legalization. In addition, other INS trainers gave directions to the effect that "the test for public charge [was] a prospective one and that it [was] only necessary to show reasonable employment which [was] current."

While the district court did not discuss the intricacies of this evidence, it clearly rejected plaintiffs' claim that the INS adopted a per se rule of automatic disqualification based on a family member's receipt of public assistance. *Perales*, 762 F.Supp. at 1065. The court specifically observed that the

aliens' testimony to the contrary was "generalized, amorphous, and remarkably redundant." *Id.* The district court found it significant that, in contrast to plaintiffs' assertion that many believed there was a per se rule of disqualification, the INS processed and approved numerous applications of aliens whose family members were receiving public assistance or who were receiving public assistance themselves. Our review of the record does not indicate that the district court's finding regarding the INS's policy was clearly erroneous. While conflicting testimony may have been presented in the lower court, we are not left with a "definite and firm conviction that a mistake has been committed." *Sumner v. United States Postal Serv.*, 899 F.2d 203, 208 (2d Cir.1990) (internal quotations and citation omitted).

Further demonstrating that there was no per se rule of automatic disqualification based on a family member's receipt of public assistance were the INS's two policy statements issued during the course of the application period regarding the operation of its public charge regulations. By memorandum dated November 23, 1987, the INS Commissioner notified the agency's four regional offices that SSI received by an applicant's family member would not be attributed to the applicant, and by memorandum dated April 21, 1988, he notified the regional offices that AFDC benefits received by an applicant's family member would only be attributed to the applicant if it was her sole means of support. In our view, these policy statements represent a clarification, not a change, of the INS's overall policy. That is, both before and after the issuance of these statements, aliens who received public assistance might be ineligible for amnesty, but they could nonetheless show evidence of self-support or apply for a waiver. The policy statements merely explained in more detail when the receipt of public assistance by a family member might demonstrate the alien's likelihood of becoming a public charge. Under the clarified regulations, an alien

might still be disqualified in some instances if a family member received public assistance. Thus, the issuance of these policy clarifications did not change the fact that an alien's individual circumstances, including the nature of certain public assistance awards to family members, was relevant to the determination of the alien's ability to support herself.

The factual finding that there was no per se rule prohibiting aliens from being granted amnesty on the basis of a family member's receipt of public assistance supports our legal conclusion that the INS's policy was broadly disseminated. Although the INS's initial regulations may have been awkwardly drafted, they placed aliens on sufficient notice of the requirements to obtain amnesty under IRCA, as required by 8 U.S.C. § 1255a(i), and of the rules and standards for receiving newly-created benefits, as required by the Due Process Clause. To the extent the regulations may have engendered questions regarding a particular applicant's eligibility, the alien could have submitted an application to determine her eligibility and, in the process, challenged the application of any regulation. Alternatively, the alien could have presented her inquiries to the regional INS office. Plaintiffs' argument that the INS should have pre-determined, at the point when it was promulgating its initial regulations, how the regulations would apply in their particular circumstances holds the INS to a standard of detail and precision that is simply not required either by IRCA or the Due Process Clause.

The INS's decision to amend the public charge regulations after the application period had passed in order to delete references to an applicant's family members is not relevant to our decision. Those amendments were made after the application period and therefore did not affect eligibility standards during the application period. Plaintiffs' procedural claims are based on the premise that the INS adopted different internal eligibility criteria than

those disseminated to the alien population, thereby dissuading them from applying. Accordingly, any changes made to the criteria after the application period had ended cannot serve as the basis for plaintiffs' procedural claims.

2. *The INS's Amendments Regarding Waiver Applications*

The other policy development challenged by plaintiffs was the INS's decision to amend the regulatory special rule so that aliens who showed evidence of self-support under the rule did not have to file a separate waiver application. While this decision may have constituted a substantive change in INS policy, the INS communicated the new rule to the four regional offices in September of 1987 and issued a technical amendment revising the regulatory special rule in November of 1987. Plaintiffs claim that because this revision came six months into the application period and was not widely communicated to the alien population directly, the INS violated its duties to disseminate pertinent information broadly and to sponsor a full twelve-month application period.

However, we believe that plaintiffs again attempt to hold the INS to too strict a standard. The IRCA does not define how broadly the INS must disseminate information relevant to the application process. It is undisputed that the INS's initial regulations were widely communicated within the agency and to the public through radio and television broadcasts, literature, and outreach programs. The INS subsequently communicated its change as to the operation of the regulatory special rule within the agency through a memorandum sent to the four regional offices and to the public through publication in the Federal Register. We cannot say that further outreach regarding this amendment was required by either IRCA or due process. Nowhere in IRCA is there a mandate that the INS must undertake a media campaign regarding revisions to the application process. Under the circumstances, we find that the INS more than fulfilled the broad dissemination requirement by

publishing these changes in the Federal Register. First, the INS had already made great efforts to inform the alien population of the amnesty program. Second, under the statutory framework, QDEs were made widely available to reach a population that would otherwise be fearful of the INS. Thus, publications in the Federal Register indicating revisions in the application process were disseminated to the alien population via the QDEs. We note, without deciding, that had no QDEs existed, given the special nature of the potential beneficiaries, publication in the Federal Register might not have been sufficient to satisfy the broad dissemination requirement. However, under the circumstances here, we hold that the INS fulfilled its statutory duties.

Given that the due process notice standard is even lower than the IRCA broad dissemination requirement, the INS also complied with its constitutional obligations. Due process cases have long recognized that publication in the Federal Register constitutes an adequate means of informing the public of agency action. See, e.g., *Lyng v. Payne*, 476 U.S. 926, 942- 43, 106 S.Ct. 2333, 2343, 90 L.Ed.2d 921 (1986). Thus, we hold that the INS fulfilled its statutory and constitutional duties with regard to providing notice to the aliens of the clarifications and revisions of the application criteria.

We also reject plaintiffs' argument that the INS's revision of the special regulatory rule violated its duty to sponsor a twelve-month application period. The twelve-month period required by IRCA referred to the time frame for accepting applications. The INS satisfied this statutory obligation by accepting applications from May 5, 1987 to May 4, 1988. There is no provision in IRCA requiring the INS to restart the application period any time it issues amendments to the rules for processing applications or clarifications of its standards for adjudicating applications. We thus affirm the district court's decision that the INS did not breach its

duties under IRCA or the Constitution to disseminate information to undocumented aliens and to sponsor a full twelve month application period.

We must nonetheless remand this case, as we initially decided to do, to determine whether plaintiffs' claim challenging the validity of the public charge regulations is ripe as to any of the plaintiffs in light of *CSS*. On remand, the district court must determine whether any of the plaintiffs were "front-desked" or can otherwise "demonstrate that the front-desking policy was ... a substantial cause of their failure ... to apply." *CSS*, — U.S. at —— n. 28, 113 S.Ct. at 2500 n. 28. We reject the INS's argument that a remand is unnecessary because it did not employ any front-desking policy or otherwise impede class members from filing applications. Ruling on such an issue would improperly require us to delve into factual issues that should be decided in the first instance by the district court.

We also reject the INS's argument that the district court already decided this issue. The district court found only that the plaintiffs who testified at trial did not take "any affirmative, conscientious step to actually file an application" and that no person had "come forth during this entire case and alleged that he or she was turned away at an INS legalization office because he or she had a welfare-dependent child." *Perales*, 762 F.Supp. at 1070. These statements do not foreclose the possibility that the plaintiff class includes members who were in fact front-desked. Although plaintiffs conceded at oral argument that the search for a front-desked class member may not prove fruitful, we cannot dispense with such an inquiry. Finally, we decline to rule on the issue of whether the governmental plaintiffs have standing and instead leave this issue, which has not been ruled on to date, to be decided in the first instance by the district court if necessary.

CONCLUSION

For the foregoing reasons, we affirm that portion of the district court's judgment that held that the INS satisfied its duty to disseminate accurate information regarding the amnesty program and remand for further proceedings as to plaintiffs' facial challenge to the public charge regulations.

CARDAMONE, *Circuit Judge*, dissenting in part: Respectfully, I dissent.

If there is a modern-day counterpart to Dickens' "Circumlocution Office" the INS most nearly fits that role. Through its delicate perception, through its tact, and through the genius with which it acted, "the Circumlocution Office was beforehand with all the public departments in the art of perceiving--HOW NOT TO DO IT." Charles Dickens, Little Dorrit (Part One) 128 (Peter Fenelon Collier & Son 1900).

BACKGROUND

A brief examination of recent accounts concerning the INS will demonstrate the validity of the comparison. As reported in the public press, the INS is found by those who deal with it to be "cold, rude, insensitive, and inefficient," not answering phone calls or letters, making clients wait for hours in lines, taking years to admit its own errors and years more to correct them. *See* Deborah Sontag & Stephen Engelberg, Insider's View of the I.N.S.: "Cold, Rude and Insensitive," N.Y. Times, Sept. 15, 1994, at A1, A18. Even the Attorney General herself was unable to get through by phone to the INS, an agency that is part of the Justice Department, which she heads. *Id.*

> "The I.N.S. is completely like a Soviet bureaucracy," said Leonid Zagalsky, 39, a Russian immigrant in New York. "Every sign starts with the word 'no': No smoking. No standing. No sitting. No asking questions. You cannot reach a human being by phone. And when you go, you stand for many

> humiliating hours in line only to reach a semi-human who answers your measly question by talking in a cabalistic language: 'I-95, dash, point 6, dash, B-52.' " (Mr. Zagalsky was referring to the agency's complex numbered forms.)

Id. This experience is not surprising. Immigration officers are trained to be rude and arrogant. During basic training, an assistant district director of INS in Chicago is quoted as saying, "we historically have told our employees that it's our job to keep [immigrants] out and our job to keep [immigrants] from getting benefits." *Id.* The INS has also been described as one of the government's "most troubled agencies," and is known for promoting misbehaving agents under a policy of "Screw up--Move up." Stephen Engelberg & Deborah Sontag, Behind One Agency's Walls: Misbehaving and Moving Up, N.Y. Times, Dec. 21, 1994, at A1, D22.

In light of this publicly catalogued attitude--contrary to and contemptuous of the fair administration of the laws of the United States--it is hardly surprising that one of the reasons this panel originally ruled in favor of the plaintiffs was because we concluded that the INS had added its own requirement to those Congress had established for eligibility for immigrants to obtain legal status. To Congress' requirement that the applicant "evidenc[e] self- support without receipt of public cash assistance," 8 U.S.C. § 1255a(d)(2)(B)(iii) (1988 & Supp. V 1993), the agency added its own regulatory requirement that the applicant must demonstrate the capacity to "maintain his or her family without recourse to public-cash assistance." 52 Fed.Reg. 16,212 (1987). For self-supporting illegal immigrants whose family members received public cash assistance, this additional requirement essentially closed the door to legalized status that Congress had opened for them. This regulation is a perfect paradigm of the agency's penchant for perceiving "HOW NOT TO DO IT."

DISCUSSION

In dealing with a complex immigration situation, Congress determined that the nation would best be served by granting amnesty to many otherwise illegal aliens and permitting them to obtain legal resident status. To accomplish this it passed the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 et seq. In executing the expressed intent of Congress to benefit this immigrant group, the INS failed in numerous ways. Taken as a whole, the string of failures constitutes an outrageous course of conduct that effectively denied these plaintiffs the one-year application period Congress had granted them. On the open road Congress paved to lead smoothly to legal status for the illegal alien population, the INS, as part of its own exclusionary policy towards immigrants, put up a roadblock preventing members of the plaintiff class from reaching their highly prized destination.

Specifically, as part of IRCA, Congress issued a mandate to the INS directing it to "broadly disseminate information respecting the benefits [i.e., legal status] which aliens may receive ... and the requirements to obtain such benefits." 8 U.S.C. § 1255a(i) (1988). While the INS' failure to comply with this mandate due to its dissemination of inaccurate information is only one of the wrongs alleged by the plaintiffs, I recognize, in light of *Reno v. Catholic Social Services*, — U.S. —, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993), that only this challenge regarding the accuracy of the disseminated information is ripe for adjudication.

My respected colleagues accept the district court's factual finding that the INS never had a per se rule with respect to the eligibility of aliens whose family members received public cash assistance. According to the majority, this finding supports their "legal conclusion" that the INS met its dissemination obligation. While conceding that the public charge regulations were "awkwardly drafted," the majority believes that they provided sufficient and accurate

notice of the standards for legalization. These legal conclusions are based, in large part, on the fact that the INS received and approved numerous applications of such aliens. The INS policy expressed in its regulations, according to the majority, means only that "an alien might be ineligible for amnesty due to his or her family members' receipt of public assistance," Maj. Op. at 1314, but that each decision with respect to eligibility was made on a case-by-case basis. The majority further believes that when immigrants were uncertain as to whether their circumstances fit within the public charge regulations, they were free to apply for a change in legal status, apply for a waiver if necessary, and upon denial of legalization challenge the regulations in court. Thus, the majority holds that the INS satisfied its obligation of broad dissemination under IRCA.

This analysis misses the mark by a wide margin. The majority errs in treating the INS' compliance with Congress' mandate as a question that can be resolved by examining how some illegal aliens actually interpreted the regulations. Its conclusion that the disseminated information did not contain a per se rule is based on the district court's finding that many aliens whose family members had received public cash assistance applied for legalization. According to the majority such applications showed the immigrant population was not misled by the public charge regulations as to the real INS policy. But that some members of the immigrant community decided to take a chance on applying does not compel a determination that the disseminated information was adequate as a matter of law. The question is whether the information disseminated to the intended beneficiaries of IRCA adequately put them on notice that the INS had a flexible case-by-case approach or whether it instead conveyed the notion that application was as a practical matter a waste of time for all those whose family members received public cash assistance.

The resolution of this legal question rests solely with a reading of the public charge regulations to determine what

information they conveyed. The regulations state that "[a]n applicant ... [is] likely to become [a] public charge[ ] unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.... An applicant for residence who is likely to become a public charge will be denied adjustment." 52 Fed.Reg. 16,211 (1987) (codified as amended at 8 C.F.R. § 245a.2(d)(4) (1992)). "Public cash assistance" is defined as "income or needs-based monetary assistance ... received by the alien or his or her immediate family members...." 52 Fed.Reg. 16,209 (1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992)). The plain meaning of these two prongs of the public charge regulations taken together is that immigrants whose family members receive public cash assistance are ineligible for legalization and hence need not apply for the benefit Congress conferred upon them.

The message conveyed by the public charge regulations becomes murky when one moves on to the third prong of the regulations--the "regulatory special rule." That rule provides that an immigrant with a "consistent employment history which shows the ability to support himself and his or her family ... may be admissible" through a discretionary waiver from the Attorney General for humanitarian purposes, to assure family unity, or when in the public interest; that "[p]ast acceptance of public cash assistance ... will enter into [the Attorney General's] decision;" and that "the length of time an applicant has received public cash assistance will constitute a significant factor [in that decision]." 52 Fed.Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (1992)).

A common sense reading of the regulatory special rule shows that the waiver is not described as a broad-based abrogation of the public charge regulations. Rather, it is worded as an exception to the public cash assistance disqualification, for the limited purpose of avoiding unduly harsh consequences. The references to the role that public

cash assistance plays in the Attorney General's decision strongly imply that receipt of such assistance, except in unusual circumstances and for minimal periods of time, will weigh against receipt of a waiver by an applicant. In effect, the waiver amounts to no more than a possible pardon, if such is the sovereign's pleasure.

A reading of the INS' summary of the key provisions of the public charge regulations, published in the Federal Register with the final regulations, corresponds to a reading of the regulations such that immigrants whose family members receive public cash assistance would generally be ineligible for legalization. The INS stated that "numerous commenters raised the concern that [the public charge regulations] may deny legalization benefits if public cash assistance was received by United States citizen children of legalization applicants. The position of INS is that the statute is clear regarding this subject and applicants may in fact be ineligible for legalization if such cash assistance was received by their U.S. citizen child." 52 Fed.Reg. 16,207 (1987).

While it is noteworthy that, in response to these comments, the INS modified the final rule to allow for the just recited waiver, the scope of the waiver--humanitarian purposes, family unity, public interest--does not invite waiver applications from the vast majority of immigrants excluded by the public charge regulations from the benefit of legalization that Congress conferred upon them. That a number of them successfully applied for waivers does not alter the legal conclusion drawn from a plain reading of the regulatory special rule and the public charge regulations as a whole. It seems obvious that a large number of the plaintiff class would have applied for legal status had not the INS disseminated information conveying the notion that it was futile to apply.

Congress did not plan for the INS to disseminate what would appear to laypersons to be a broad restriction on

eligibility, and then rely on rumor or word-of-mouth--among what the majority itself characterizes as "an uneducated and fearful alien population"--to negative the restriction by telling these wary immigrants that, contrary to the disseminated information, the INS policy is really "maybe yes, maybe no, try your luck." As earlier observed, the INS' basic training course teaches its agents how to keep immigrants out and how to deny them benefits to which they are legally entitled. The basic training worked superbly in the case of the rights granted immigrants under IRCA because the INS' failure to accurately describe the requirements for legalization effectively excluded nearly the entire plaintiff class.

CONCLUSION

In my view the regulations promulgated by the INS failed as a matter of law to reasonably inform these mostly working mother immigrants with U.S. citizen children of information necessary for them to realize they were potentially eligible for legalization, in violation of IRCA's broad dissemination requirement, 8 U.S.C. § 1255a(i). As a result, this six-year-old litigation is culminating in an unjust judgment against the plaintiff class, consigning them to a marginal life and subjecting them to deportation and separation from their U.S. citizen children. Even if these working, long-term residents of the U.S. escape deportation, the present denial of the opportunity to obtain legal status condemns them to a limbo where they may no longer be able to find employment and effectively places their children on welfare. From which injustices, Congress meant to free them.

Accordingly, I vote to grant the relief the panel granted in its earlier decision requiring the INS to disseminate information consistent with the will Congress expressed in IRCA and opening the window of opportunity for members of plaintiffs' class for a one-year period. *See Perales v. Thornburgh*, 967 F.2d 798, 814-15 (2d Cir.1992).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 253, 254, 255 -

Dockets 91-6133, 91-6135 and 91-6167

CESAR A. PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK; STATE OF NEW YORK; CITY OF NEW YORK; SARA DOE; JANE ROE; ANNE COE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-APPELLANTS,

FRAN FOE; MARY MOE; LINDA LOE; SUSAN SOE; ZELDA ZOE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-INTERVENORS-APPELLANTS,

v.

RICHARD L. THORNBURGH, AS ATTORNEY GENERAL OF THE UNITED STATES; TERRANCE O'REILLY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE; GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR; SCOTT BLACKMAN, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT; LOUIS W. SULLIVAN, M.D., AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES.

On remand from Supreme Court
Argued Sept. 30, 1991
Decided June 24, 1992
Vacated and Remanded June 28, 1993.
Remanded Aug. 24, 1993

Before: CARDAMONE, WALKER and McLAUGHLIN, *Circuit Judges.*

Aliens brought class action alleging that regulations implementing amnesty legislation were constitutionally and statutorily defective. The United States District Court for the Southern District of New York, Kenneth Conboy, J., 762 F.Supp. 1036, dismissed action. Aliens appealed. The Court of Appeals, 967 F.2d 798, reversed and remanded. Certiorari was granted. The Supreme Court, 113 S.Ct. 3027, vacated and remanded. On remand, the Court of Appeals held that remand to District Court was required for factual findings on whether aliens were "front-desked" by Immigration and Naturalization Service (INS), or otherwise had challenged regulations applied to them under Immigration Reform and Control Act of 1986, in sufficiently concrete manner to make out ripe claims for challenge of regulations, even though aliens had not applied for adjustment of status under Act. Remanded.

PER CURIAM:

We initially decided this appeal in *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir.1992). The Supreme Court granted certiorari and vacated the case and remanded it to us for further consideration in light of *Reno v. Catholic Social Services, Inc.*, 509 U.S. ----, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). *Reno v. Perales*, --- U.S. ----, 113 S.Ct. 3027, 125 L.Ed.2d 716 (1993).

In *Catholic Social Services*, the Court held that aliens challenging regulations promulgated pursuant to the

Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (the "Act"), but who had not applied for adjustment of status under the Act, did not make out ripe claims merely because the challenged regulations were promulgated or because they believed the regulations made them ineligible for adjustment of status. The Court noted that this was true whether the alien had heard of the challenged regulations from an attorney, word-of-mouth, or from a "QDE," a private organization such as a community center or church that is designated by the Attorney General pursuant to the Act to disseminate information about the Act and assist in the preparation of applications. *Catholic Social Services*, 509 U.S. at ---- - ---- n. 19, 113 S.Ct. at 2491 n. 19. However, the Court held that aliens whose applications were "front-desked," that is, turned away by Immigration and Naturalization Service employees and never processed because the applicant would be ineligible under the challenged regulations, would have ripe claims. *Id.*, 509 U.S. at ---- - ----, 113 S.Ct. at 2497. The Court also noted: "Although we think it unlikely, we cannot rule out the possibility that further facts would allow class members who were not front-desked to demonstrate that the front-desking policy was nevertheless a substantial cause of their failure not to apply, so that they can be said to have had the [challenged regulations] applied to them in a sufficiently concrete manner to satisfy ripeness concerns." *Id.*, 509 U.S. at ---- n. 28, 113 S.Ct. at 2500 n. 28.

In this case, the plaintiffs also challenge regulations promulgated under the Act. As in *Catholic Social Services*, there are not facts in the record sufficient for us to determine which, if any, of the members of the plaintiff class were front-desked or otherwise had the challenged regulations applied to them "in a sufficiently concrete manner to satisfy ripeness concerns." We therefore remand this case to the district court for further proceedings consistent with *Catholic Social Services* and this opinion.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-451

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS,

v.

CESAR A. PERALES, ET AL.

June 28, 1993

Case below, *Perales v. Thornburgh*, 762 F.Supp. 1036; 967 F.2d 798.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Reno v. Catholic Social Services, Inc.*, 509 U.S. ----, 113 S.Ct. 2485, --- L.Ed.2d ---- (1993).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 253, 254, 255 - August Term, 1991
Dockets 91-6133, 91-6135 and 91-6167

CESAR A. PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK; STATE OF NEW YORK; CITY OF NEW YORK; SARA DOE; JANE ROE; ANNE COE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-APPELLANTS

FRAN FOE; MARY MOE; LINDA LOE; SUSAN SOE; ZELDA ZOE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-INTERVENORS-APPELLANTS

v.

RICHARD L. THORNBURGH, AS ATTORNEY GENERAL OF THE UNITED STATES; TERRANCE O'REILLY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE; GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR; SCOTT BLACKMAN, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT; LOUIS W. SULLIVAN, M.D., AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

Argued Sept. 30, 1991

Decided June 24, 1992

Before: CARDAMONE, WALKER and McLAUGHLIN, *Circuit Judges.*

Appeal from a Judgment entered April 22, 1991 of the United States District Court for the Southern District of New York (Conboy, *J.*), entering judgment in favor of the government and dismissing the complaint. Reversed and remanded.

WALKER, *Circuit Judge*:

This case concerns the amnesty program of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 *et seq.* Plaintiffs-appellants ("plaintiffs") challenge Immigration and Naturalization Service ("INS") regulations implementing the statutory exclusion of aliens "likely at any time to become a public charge." *See* 8 U.S.C. § 1182(a)(4) (Supp. II 1990). Plaintiffs claim that the regulations violated IRCA by disqualifying self-supporting aliens whose family members received public assistance. While the INS later revised its regulations to address plaintiffs' concerns, plaintiffs' maintain that prior to this revision the regulations deterred qualified aliens from applying, thereby denying them the full statutory application period. They further claim that the agency failed to "broadly disseminate information" regarding the revisions as required by statute. *See* 8 U.S.C. § 1255a(i) (1988). The United States District Court for the Southern District of New York (Conboy, *J.*), found the INS public charge regulations consistent with IRCA, and dismissed

plaintiffs' complaint. We reverse the ruling of the district court and remand for further proceedings consistent with this opinion.

BACKGROUND

The Immigration Reform and Control Act's Amnesty Program.

By the 1980's, Congress faced a serious dilemma in immigration policy. A multitude of aliens had illegally entered the United States and settled here, causing damage to domestic labor, the economy, and to the opportunities of those seeking to lawfully cross our borders. *See* H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 52, *reprinted in* 1986 U.S.Code Cong. & Admin. News 5,649, 5,656. However, the cost and difficulty of removing these illegal aliens made their deportation a practical impossibility. *Id.* at 49, *reprinted in* 1986 U.S.Code Cong. & Admin. News 5,649, 5,653. Moreover, Congress recognized that many illegal aliens had over time made significant contributions to the nation, and that our own past failures in enforcement were in part responsible for the surge in illegal immigration. *Id.*

IRCA provided a compromise solution. It undercut the incentives for illegal immigration by sanctioning employers who hire undocumented workers. At the same time, IRCA offered amnesty to undocumented aliens who, over the years, had shown their capacity to be contributing members of society. This case concerns the INS' implementation of the amnesty program.

A. *The Amnesty Provisions.*

Amnesty was to take place in two stages. During a twelve-month period beginning "on a date ... designated by the Attorney General" and later established by regulation as May 5, 1987 through May 4, 1988 (the "application period"), illegal aliens could apply to the INS for temporary resident status. 8 U.S.C. § 1255a(a)(1) (1988). The second stage, to commence nineteen months after the receipt of temporary resident status, gave aliens one year, later

extended to two, *see* Pub.L. No. 101-649, § 703(a), 104 Stat. 5086 (1990), in which to apply for permanent resident status. 8 U.S.C. § 1255a(b)(1)(A), (2)(C) (1988 & Supp. II 1990). Aliens could tender their applications to the INS or to Qualified Designated Entities ("QDEs"), nongovernmental agencies enlisted to serve as "buffers" between aliens and the government. *See* 8 U.S.C. § 1255a(c)(1) (1988). IRCA further required the INS, in conjunction with the QDEs, to "broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits." 8 U.S.C. § 1255a(i) (1988).

IRCA conditioned adjustment to temporary resident status on the meeting of four broad eligibility requirements. Sections 1255a(a)(1)-(4) mandated the Attorney General to grant this adjustment of status where the applicant: (1) had filed a timely application; (2) had maintained continuous unlawful residence since 1982; (3) had maintained a continuous physical presence since November 6, 1986; and (4) was "admissible to the United States as an immigrant." 8 U.S.C. § 1255a(a)(1)-(4) (1988).

The current appeal centers on the fourth criterion: admissibility as an immigrant. To show that she was "admissible ... as an immigrant," 8 U.S.C. § 1255a(a)(4) (1988), an alien had to establish, *inter alia*, that she was not inadmissible under 8 U.S.C. § 1182(a)(4) (Supp. II 1990) pursuant to which "[a]ny alien who, in the opinion of the ... Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable." IRCA's "Special Rule for Determination of Public Charge" (the "statutory special rule") limited the agency's broad discretion in this area, stating that an alien "is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(4) of this title [relating to the public charge determination] if the alien demonstrates a history of

employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). In a separate provision, IRCA authorized the Attorney General to waive "in the case of individual aliens" any of the excludability provisions of § 1182(a), including the public charge provision, "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1255a(d)(2)(B)(i).

B. *The INS' May 1, 1987 Public Charge Regulations.*

Pursuant to these provisions, the INS promulgated final regulations on May 1, 1987, 52 Fed.Reg. 16,205 *et seq.* (1987) (codified as amended at 8 C.F.R. § 245a (1992)). The INS broke the statutory amnesty scheme down into three parts. First, the agency's "Proof of financial responsibility" regulation mirrored the statutory language by providing that "[a]n applicant for adjustment of status ... [is] likely to become [a] public charge[ ] unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 52 Fed.Reg. 16,211 (1987) (codified as amended at 8 C.F.R. § 245a.2(d)(4) (1992)).[1] Integral to

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1 The provision stated:

> (4) Proof of financial responsibility. An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if

this provision was the regulation's definition of "public cash assistance" as "income or needs-based monetary assistance ... received by the alien or his or her immediate family members through federal, state or local programs designed to meet subsistence levels." 52 Fed.Reg. 16,209 (1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992)).[2] The third element, entitled "Special Rule for Determination of Public Charge" (the "regulatory special rule") provided in relevant part that "[a]n alien who has a consistent employment history which shows the ability to support himself and his or her family ... may be admissible" through a discretionary waiver from the Attorney General. 52 Fed.Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (1992)).[3]

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there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

2 This provision stated in full:

"Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health). 52 Fed.Reg. 16209 (1987).

3 The regulatory special rule provides that:

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even

C. *Developments in INS Policy.*

Prior to the issuance of the May 1, 1987 regulations, groups representing aliens had commented that the proposed public charge regulations unlawfully conditioned a showing of self-support upon the non-receipt of public assistance by family members. Just over four months into the application period, the INS began a series of "clarifications" and amendments of the public charge provisions. A September 23, 1987 memorandum from Associate Commissioner Norton to the four regional commissioners removed the regulatory special rule's waiver requirement, stating that "[n]o waiver application is necessary to apply the special rule for determination of public charge." Commissioner Norton repeated this instruction in an October 1, 1987 letter to Edward J. Wildblood, the Regional Legalization Officer of the Eastern Regional Office. On November 17, 1987, the INS formalized

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though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section [providing for waivers for humanitarian purposes, to assure family unity, or when in the public interest]. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. 52 Fed.Reg. 16,212 (1987).

this policy, issuing a technical amendment that deleted the waiver requirement from its special rule. 52 Fed.Reg. 43,843 (Nov. 17, 1987) (codified at 8 C.F.R. § 245a.2(k)(4) (1992)).

The INS also revised its definition of "public cash assistance." A November 23, 1987 memorandum from Commissioner Norton to the four regional commissioners explained that "SSI [Supplemental Security Income] should be considered as public cash assistance only with regard to the person who receives it. SSI should not be attributed as public cash assistance to the immediate family members who reside with the recipient, but who themselves are non-recipients." The agency's position with respect to Aid to Families with Dependent Children (AFDC) developed more slowly. A December 9, 1987 memorandum from Paul Virtue, INS General Counsel, to Terry O'Reilly, Deputy Assistant Commissioner for Legalization, explained that

> if a family of three applied for AFDC and the parents were both ineligible aliens the benefit would still be granted to the United States Citizen child and that the child is considered the recipient.... For our purposes, it would seem to me that the parents in such a situation would not be considered to have received "public cash assistance".

In a February 12, 1988 letter responding to questions from a District of Columbia Official, Assistant Commissioner William Slattery indicated that "[p]ublic charge status is not conveyed to the parent-payee if the United States citizen child is the recipient [of AFDC]." Finally, on April 21, 1988, just two weeks before the close of the application period, Commissioner Norton adopted this position in a memorandum to the four Regional Commissioners:

> As a general rule, the receipt of AFDC benefits by a member of the legalization applicant's family is not attributed to the applicant for purposes of

> determining the likelihood that the applicant will become a public charge.... If, however, the family is reliant on the AFDC benefits as its sole means of support, the legalization applicant may be considered to have received public cash assistance. This determination must be made on a case-by-case basis and upon consideration of the totality of the applicant's circumstances.

Following the May 4, 1988 close of the application period, in a written decision dated December 29, 1988, Commissioner Norton broadened the April 21, 1988 position. He held that even a non-working applicant whose children had received public cash assistance would not be excludable as likely to become a public charge, since

> [i]t is not unusual for a mother to stay at home to care for her children, especially when the children have not started school. A mother's absence from the work force to care for her children is not by itself sufficient basis to find the mother likely to become a public charge.

Matter of A., Interim Decision No. 3097 at 4 (Imm. Nat. Serv. Dec. 29, 1988). Finally, in July of 1989, more than one year after the May 5, 1988 application cutoff date, the INS formally amended its regulatory definition of "public cash assistance" to delete all reference to the alien's immediate family members. The Federal Register notice explained that "[t]he receipt of public cash assistance by immediate family members will not have a bearing on an applicant's eligibility for legalization." 54 Fed.Reg. 29,442, 29,443 (1989).

The July 1989 amendments also removed from the regulatory special rule references to an alien applicant's family. From that point on "an applicant need[ed] only [to] demonstrate a consistent employment history that shows the ability to support himself or herself." *Id.* at 29,443-44.

Prior Stages of This Lawsuit.

The prior history of this lawsuit bears on our disposition of this appeal, and thus merits some discussion. On April 1, 1988, approximately one month before the end of the application period, plaintiffs filed their complaint. They asserted, first, that the INS public charge regulations were facially invalid since they included consideration of public assistance by an alien's family members in the finding as to whether the alien herself was self-supporting. Plaintiffs further alleged that the INS had failed to "broadly disseminate", as required by statute, its policy statements and regulatory amendments revising the public charge regulations. *See* 8 U.S.C. § 1255a(i) (1988). The class of nongovernmental plaintiffs, as later certified, consisted of

> [a]ll undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R.§§ 245a.1(i), 245a.2(d)(4) and 245a.2(k)(4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not limited to those individuals who were deterred from filing applications for legalization under the Legalization program.

These plaintiffs sought a declaration as to the unlawfulness of the regulations and the dissemination effort. They further sought an order requiring defendants to readjudicate, without reference to family members' receipt of public assistance, all applications of class members denied on public charge grounds and requiring the agency to accept applications for a period of one year from those class members whom the unlawful regulations had deterred from filing.

In early April, 1988, plaintiffs applied for a temporary restraining order directing the INS to disseminate its revised

policy that a child's receipt of public cash assistance does not convey public charge status to the parent. In response, the INS represented to the district court that it would issue instructions to this effect to all regional and district legalization offices, and to all approved QDEs who were assisting the INS in the legalization process. The district court thereupon denied the application. Commissioner Norton issued the stated instructions in the April 21, 1988 memorandum to the four regional commissioners, referenced earlier. Plaintiffs, arguing that the clarification came too late to benefit those class members deterred from applying, moved for a preliminary injunction. The district court denied the motion, but on May 4, 1988 we granted plaintiff's motion for a temporary injunction and ordered the INS to accept applications accompanied by the statutory fee, a number of which were filed. On May 18, 1988 four aliens who had applied during this period moved to intervene. On May 19, 1988, we affirmed the district court's denial of the preliminary injunction, and dissolved our temporary injunction. *Perales v. Meese*, 847 F.2d 55 (2d Cir.1988) (per curiam). The INS has yet to adjudicate the amnesty applications tendered while the temporary injunction was in effect.

On June 28, 1988, plaintiffs moved for partial summary judgment and the agency cross-moved. The district court, in an opinion dated March 29, 1989, granted plaintiffs' motions for intervention and class certification, but denied summary judgment motions to both sides. Plaintiffs moved for reargument on the facial invalidity of the challenged regulations. The parties settled this motion by a Stipulation and Order, filed July 21, 1989, which required defendants: (1) to publish amended regulations deleting the references to family members from the definition of public cash assistance and from the regulatory special rule; and (2) to reopen all timely filed applications that had been denied on public charge grounds and to readjudicate them in accordance with the amended regulations. The INS thereupon issued the July

1989 amendments discussed above. Upon readjudication, the INS approved all but one of the applications previously denied on public charge grounds.

The district court then held a six-day bench trial during which plaintiffs put in testimony from aliens, QDE representatives and immigrant advocates. INS officials also testified. The findings of the district court, as well as excerpts from the trial transcript, are reported in a thoughtful thirty-three page opinion at 762 F.Supp. 1036 (S.D.N.Y.1991). In conclusion, the district court determined that the INS public charge regulations were neither facially invalid nor unlawful as applied. It further held that, even if plaintiffs had succeeded on the merits, under *INS v. Pangilinan*, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988), a federal court would not have authority to compel the INS to open the application period to plaintiffs. This appeal followed.

DISCUSSION

I. *Subject Matter Jurisdiction.*

At the outset, we must decide whether we have subject matter jurisdiction in this case. In a letter to the district court, defendants originally conceded subject matter jurisdiction. However, shortly after oral argument on appeal, they raised the issue anew in light of the D.C. Circuit's recent opinion in *Ayuda v. Thornburgh*, 948 F.2d 742 (D.C.Cir.1991). Plaintiffs contend that defendants' concession of jurisdiction forecloses its reconsideration.

The limited jurisdiction of federal courts is derived from the Constitution and the Congress, not from the consent of the parties. Therefore, a party cannot waive lack of subject matter jurisdiction, *see, e.g., Reale Intern., Inc. v. Federal Republic of Nigeria*, 647 F.2d 330, 331 (2d Cir.1981), and the issue must be considered.

Federal question jurisdiction pursuant to 28 U.S.C. § 1331 would ordinarily cover the statutory and

constitutional claims before us. *See, e.g., Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir.1991); *Johnsrud v. Carter*, 620 F.2d 29, 31-32 (3d Cir.1980). Defendants, however, urge that the IRCA's judicial review provisions are exclusive and deprive us of jurisdiction. *See* 8 U.S.C. § 1255a(f)(1)-(4) (1988). At the outset, we note the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, --- U.S. ----, 111 S.Ct. 888, 898, 112 L.Ed.2d 1005 (1991); *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986) ("[f]rom the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' ") (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967)).

The relevant review procedures set forth in § 1255a(f)(1)-(4) are as follows:

> **(1) Administrative and judicial review**
>
> There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.
>
> **(2) No review for late filings**
>
> No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.
>
> **(3) Administrative review**
>
> **(A) Single level of administrative appellate review**
>
> The Attorney General shall establish an appellate authority to provide for a single level of

administrative appellate review of a determination described paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

A. *Do §§ 1255a(f)(1), (3) and (4) deprive this court of jurisdiction?*

The Supreme Court in *McNary, supra,* held that provisions codified at 8 U.S.C. §§ 1160(e)(1)-(3), which are identical to § 1255a(f)(1), (3) and (4) and govern judicial review of IRCA's Special Agricultural Worker (SAW) program, applied "only to review of denials of individual ... applications" and not to "challenges to the procedures used by INS." *McNary,* 111 S.Ct. at 897. Each of the Court's reasons apply with equal force to §§ 1255a(f)(1), (3) and

(4). The reference in § 1255a(f)(1) to "a determination" and in § 1255a(f)(4) to "a denial" limit the scope of these provisions to "single" application determinations and do not cover challenges to an INS "practice or procedure." *McNary*, 111 S.Ct. at 896. Section 1255a(f)(4)'s requirement that judicial review be "based solely on the administrative record" under an "abuse of discretion" standard is inappropriate for review of statutory or constitutional claims which are generally reviewed *de novo* by the courts. *Id.* at 896-97. Finally, if "Congress [had] intended the limited review provisions of ... the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.* at 897. Accordingly, *McNary* compels the conclusion that §§ 1255a(f)(1), (3) and (4) do not apply to the present challenge to INS procedures. *Accord Catholic Social Services v. Thornburgh*, 956 F.2d 914, 921 (9th Cir.), *cert. granted sub nom. Barr v. Catholic Social Services, Inc.*, --- U.S. ----, 112 S.Ct. 2990, 120 L.Ed.2d 867 (1992); *cf. Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir.1991).

Defendants contend that the D.C. Circuit's reasoning in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C.Cir.1991), holding that § 1255a(f) deprived the court of jurisdiction to hear certain claims under IRCA, requires a different result. *Ayuda* reads *McNary* as drawing a distinction between true collateral challenges which are not covered by IRCA's exclusive review provisions, and claims that dress themselves up as "procedural" challenges but actually seek to resolve the ultimate merits of an alien's application for adjustment of status which are covered. *Ayuda*, 948 F.2d at 749. We agree with the D.C. Circuit that the Supreme Court engaged in such line drawing so as to distinguish *Heckler v. Ringer*, 466 U.S. 602, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984). *See McNary*, 111 S.Ct. at 897-98. *But see Catholic Social Services*, 956 F.2d at 921.

We disagree with *Ayuda*, however, insofar as it holds that a claim that unlawful INS procedures have deterred plaintiffs from filing applications is a claim which seeks to resolve the ultimate merits of an alien's application for adjustment of status. *See Ayuda*, 948 F.2d at 756-58. If plaintiffs succeed in obtaining an order from us to reopen the filing period as to them, they will still have to file timely applications and there is no guarantee that they will do so. Nor is there a guarantee that, if they do so, the applications will be granted. *Ayuda's* assumption that plaintiffs "satisfy those other criteria so that they could present an otherwise 'prima facie application for adjustment of status,' " *Ayuda*, 948 F.2d at 757 (quoting 8 U.S.C. § 1255a(e)(2) (1988)), may have been valid in that case, but in this one the most that can be said is that plaintiffs who will file will have reason to believe that their applications will not be denied on the grounds that they are "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4) (Supp. II 1990). They may be wrong in this belief or their applications may be denied on other grounds in which case § 1255a(f) review procedures will be their exclusive avenue of relief. Thus, even if we grant relief in this case, plaintiffs' success on the merits of their applications does not follow as a matter of course. We conclude, as did the Court in McNary, that the case before us presents a true "collateral challenge" and that

> [u]nlike the situation in Heckler, the individual respondents in this action do not seek a substantive declaration that they are entitled to [adjustment of] status. Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to [adjustment of] status. Rather, if allowed to prevail in this action, respondents would only be entitled to have ... their applications reconsidered in light of the newly prescribed INS procedures.

McNary, 111 S.Ct. at 898.

B. *Does § 1255a(f)(2) deprive us of jurisdiction?*

Ayuda's denial of jurisdiction rested independently on § 1255a(f)(2), which has no identical twin in the statute considered in *McNary*. This provision provides that: "[n]o denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." The D.C. Circuit found that § 1255a(f)(2) "could not in our opinion indicate more plainly that the district court has no power to order the INS to grant [a change of status] to aliens who failed to file applications on time." *Ayuda*, 948 F.2d at 758.

Section 1255a(f)(2) speaks of "a late filing of an application" (emphasis added). Following the Court's reasoning in *McNary*, we interpret this phrase as relating only to denials of individual applications and not to collateral challenges to a practice or procedure. *See McNary*, 111 S.Ct. at 896 ("[t]he critical words ... describe the provision as referring only to review 'of *a determination* respecting *an application* ' for SAW status. Significantly, the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure") (quoting 8 U.S.C. § 1160(e)(1)) (emphasis in *McNary*); *accord Catholic Social Services*, 956 F.2d at 920; *Doe v. Nelson*, 703 F.Supp. 713, 718 (N.D.Ill.1988). Section 1255a(f)(2) thus does not cover the collateral challenge before us.

We further find § 1255a(f)(2) inapplicable because the INS has, as yet, denied no plaintiff's application on late filing grounds. Thus the triggering event, the "denial of adjustment of status ... based on a late filing," has not occurred.

With respect to this point, the *Ayuda* court expressed concern that "aliens who missed the deadline could circumvent Congress' clear purpose of preventing them from

coming to court after losing before the INS on this issue simply by going to court before filing with the agency." *Ayuda*, 948 F.2d at 758. This concern is not present here. Plaintiffs claim that they would have filed on time but for the INS practices under challenge and, as we shall explain below, individual plaintiffs will be required to demonstrate this in order to gain full relief. This action thus presents the question of whether *defendants* have circumvented a clear congressional purpose to provide a 12-month application period to qualified applicants, not whether plaintiffs have done so. *Cf. Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir.1991).

Neither IRCA's plain language nor its legislative history suggests that Congress intended, in § 1255a(f)(2), to insulate from judicial review INS regulations which assertedly have the effect of shortening or eliminating altogether the statutory application period. The amnesty provisions as a whole, in fact, indicate that Congress placed great importance on the proper implementation of the application period: Congress specified that there should be a "12-month" period, 8 U.S.C. § 1255a(a)(1)(A) (1988); it made non- discretionary the Attorney General's duty to adjust the status of those who meet eligibility requirements, including the requirement of a timely application, 8 U.S.C. § 1255a(a) (1988); and IRCA's legislative history explained that aliens "have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars," and that the national interest lay in providing a "generous" amnesty program which included 12 months in which to apply. H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 49, *reprinted in* 1986 U.S.Code Cong. & Admin.News 5,649, 5,653. These expressions of congressional purpose are consistent with judicial review of INS implementation of the application period. Given our presumption in favor of judicial review of agency action, we decline to read into § 1255a(f)(2) a congressional purpose to preclude review of the claim before us. "[O]nly upon a showing of 'clear and

convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review [of agency action]." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967).

In sum, we hold that 8 U.S.C. §§ 1255a(f)(1)-(4) do not bar federal courts from reviewing the present action.

II. *Validity of the INS Public Charge Regulations.*

Turning to the merits, we consider plaintiffs' claim that the May 1, 1987 public charge regulations violated IRCA, the Administrative Procedure Act ("APA"), and the Fifth Amendment's guarantee of equal protection. Since we conclude herein that the regulations contravened IRCA throughout the one-year application period, we need not reach plaintiffs' APA and Fifth Amendment arguments, nor need we consider their challenge to the INS' dissemination policies.

A. *Do the public charge regulations violate IRCA?*

Under IRCA's Special Rule for Determination of Public Charge (the "statutory special rule"), an alien "is not ineligible for adjustment of status" on public charge grounds where she "demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance." 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). This provision requires an alien to show that she is self -supporting. The May 1, 1987 public charge regulations, on the other hand, excluded self-supporting aliens if they could not simultaneously support their families. In so doing, they violated the statute.

The May 1, 1987 regulations deemed "likely to become a public charge" any alien who fails to "demonstrate[ ] a history of employment in the United States evidencing self-support *without receipt of public cash assistance*." 52 Fed.Reg. 16,211 (1987) (codified as amended at 8 C.F.R. § 245a.2(d)(4) (1992)) (emphasis added). Public cash assistance, however, meant "income or needs-based

monetary assistance ... received by the alien *or his or her immediate family members.*" 52 Fed.Reg. 16,209 (1987) (codified as amended at 8 C.F.R. § 245a.1(i) (1992)) (emphasis added). As the district court recognized, these provisions would exclude a self-supporting alien whose family member received public assistance. *Perales*, 762 F.Supp. 1059-60. The district court nonetheless found the regulations valid on the grounds that self-supporting aliens with a family member on public assistance might yet be admitted under the agency's Special Rule for Determination of Public Charge (the "regulatory special rule"), 8 C.F.R. § 245a.2(k)(4). *Perales*, 762 F.Supp. at 1060. We disagree with this analysis for two reasons.

First, under the regulatory special rule an applicant who qualifies under the terms of the rule must then apply for a discretionary waiver from the Attorney General. *See* 52 Fed.Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (1992)) ("An alien who has a consistent employment history which shows the ability to support himself and his or her family ... *may be admissible under paragraph (k)(2) of this section* [providing for waivers of grounds of exclusion]") (emphasis added). The only apparent textual basis for this two-stage process is that the statutory special rule exists within a larger subsection entitled "Waiver of numerical limitations and certain grounds for exclusion." 8 U.S.C. § 1255a(d) (Supp. II 1990).

The body of the provision makes clear, however, that Congress intended to directly exempt from public charge excludability aliens who qualify under the statutory special rule, and did not contemplate an additional waiver requirement. To begin with, the statutory special rule's application to any "adjustment of status *under this section* " expressly extends its reach beyond the waiver subsection. *See* 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). More importantly, the statutory special rule instructs that a qualified applicant "*is* not ineligible" on public charge

grounds. *Id.* No waiver is necessary. Rather, once the Attorney General finds a "history of employment evidencing self-support" the statute precludes him from finding the applicant inadmissible on public charge grounds. Finally, had Congress merely intended the special rule to authorize waivers the provision would have been redundant. Other provisions already empowered the Attorney General to waive the public charge criterion for adjustment to temporary resident status. *See* 8 U.S.C. § 1255a(d)(2)(B)(i), (ii)(IV) (1988 & Supp. II 1990).

While we ordinarily accord deference to an agency's construction of the statute it administers, we need not do so where, as here, the text clearly establishes a contrary congressional intent.

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.... If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 & n. 9, 104 S.Ct. 2778, 2781-82 & n. 9, 81 L.Ed.2d 694 (1984) (citations omitted). Later changes in the INS position, culminating in the November 17, 1987 amendment excising the waiver requirement, *see* 52 Fed.Reg. 43,843 (Nov. 17, 1987) (codified at 8 C.F.R. § 245.2(k)(4) (1992)), strengthen this conclusion. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987); *Morton v. Ruiz*, 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974). We accordingly find that the regulatory special rule's waiver requirement violated IRCA, and that the district court erred in concluding that the regulatory special rule saved the regulations. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 443, 107 S.Ct. 1207, 1219, 94 L.Ed.2d 434 (1987) (alien's right to

remain in United States not equivalent to opportunity to gain asylum at Attorney General's discretion).

The regulatory special rule's deficiencies extended beyond the waiver issue and beyond November 17, 1987. As plaintiffs point out, the regulatory special rule itself looks impermissibly to an applicant's ability to support her family. Under the regulatory special rule, the public charge ground of exclusion would be lifted only for an applicant who could "show[ ] the ability to support himself *and his or her family* ... [and] the capacity to exist on his or her income and *maintain his or her family* without recourse to public cash assistance." 52 Fed.Reg. 16,212 (1987) (codified as amended at 8 C.F.R. § 245a.2(k)(4) (emphasis added)). By demanding more from the applicant than a demonstration of *self*-support, the only required showing under the statute, the provision further violated IRCA.

The record reveals that the INS recognized this problem, albeit belatedly, and moved to correct it. The agency's July 1989 amendments removed all references to an alien's family from the regulatory special rule. 54 Fed.Reg. 29,442, 29,443-44 (July 12, 1989). Thereafter, the Federal Register notice instructed, "an applicant need[ed] only [to] demonstrate a consistent employment history that shows the ability to support *himself or herself*." *Id.* (emphasis added). These amendments post-dated the May 4, 1988 cut-off date for applications. Thus we have no difficulty finding that the regulatory special rule contravened the statute throughout the 12-month application period.

Having so held, we note that our decision does not preclude the INS from ever attributing a family members' receipt of public assistance to the alien applicant. Where the child's public assistance is the family's only means of income the INS may reasonably conclude that the parent lives off of it. Indeed, IRCA's requirement that an alien show "self-support *without receipt of public cash assistance*" contemplates such a determination since, as plaintiffs

concede, illegal aliens are not themselves eligible for public assistance. Having concluded that defendants may not exclude a self-supporting applicant based on her family member's receipt of cash assistance, we further hold that the INS may, in examining whether an applicant is self-supporting, consider whether she lives off her family member's cash assistance.

B. *Did the Agency Promulgate its Unlawful Regulations?*

Defendants argue that the post-May 4, 1987 policy memoranda discussed above more accurately reflected their policies as implemented than did the May 1, 1987 regulations. These policy memoranda, they contend, "did not represent any departure from the INS's public charge policies as the INS understood them at the inception of the amnesty filing period. Rather, the memoranda clarified the INS's policy by responding to questions from, and providing guidance to, the INS's four regional offices." Appellees' Brief at 48-49. We understand defendants to argue that, notwithstanding the confusing language of the May 1, 1987 regulations, their policies as they understood and implemented them were consistent with IRCA throughout the filing period and could not have unlawfully deterred plaintiffs' applications.

This argument is convincingly rebutted by documentation revealing that the INS disseminated the very aspects of the May 1, 1987 regulations which we have found unlawful. For example, plaintiffs' exhibit 54, entitled "The Public Charge Issue" and written by Richard Berryman, Chief Legalization Officer and Legalization Training Officer for New York, records the instructions conveyed at three regional staff trainings in April and May of 1987 and at a session for QDE's in Manhattan on July 24, 1987. In reference to the regulatory special rule, Officer Berryman stated that:

> In summary, 245A applicants for temporary residence who have received cash assistance because they were unable to support themselves *and/or their families* are subject to 212(a)(15) [the public charge exclusion]. They may *apply for a waiver* if the waiver criteria apply: family unity, humanitarian considerations and in the public interest. Most of the QDE representatives present indicated that most of their clients who had received welfare did so due to entitlements to their U.S. citizen children. I indicated that these applicants *should file a waiver.* (emphasis added).

This paragraph contains both of the policies for which we have found statutory authorization lacking: it looks to whether applicants are able to support their families; and, for those who satisfy the special rule, it conditions eligibility on satisfaction of the discretionary waiver process.

Other instances in which the INS disseminated its unlawful policies include an October 1, 1987 newsletter to QDEs which discusses the waiver requirement, and an update from the Eastern Regional Officer mailed on September 30, 1987 to local Legalization Offices reaffirming that a special rule applicant would "NEED CONSISTENT HISTORY OF EMPLOYMENT TO MAINTAIN FAMILY " (emphasis added).

Defendants cite only an October 15, 1987 issue of the National Center for Immigrant's Rights' *Legalization Update,* which states that

> [a]n INS agent at the RPF in Texas has apparently stated that welfare received by a U.S. citizen child of legalization eligible parents will not be considered in determining public charge excludability of the parents.... Reports from other states, including New Mexico and New York, seem to indicate that INS may have adopted a similar policy.

This single perception of what policy the INS "may have adopted," when viewed against the substantial publicity going the other way, is insufficient to support defendants' claim that "the advocate community was aware that the INS was not imputing AFDC aid received by children to alien parents." The record as a whole convinces us that the unlawful May 1, 1987 regulations constituted official agency policy as communicated to aliens in New York State.

III. *Relief.*

Having found injury, we turn to the question of relief. Generally, federal courts can remedy unlawful agency action both through prohibitory injunctions, *see Youngstown Sheet & Tube Co. v. Sawyer*, 103 F.Supp. 569, 576 (D.D.C.) *aff'd* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), and mandatory injunctions, *see Carpet, Linoleum and Resilient Tile Layers v. Brown*, 656 F.2d 564, 567 (10th Cir.1981); *Covelo Indian Community v. Watt*, 551 F.Supp. 366, 381 (D.D.C.1982); *cf. Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir.1991). Although plaintiffs also suggest equitable estoppel and equitable tolling, we need not consider these doctrines here. *See Lyng v. Payne*, 476 U.S. 926, 936, 106 S.Ct. 2333, 2340, 90 L.Ed.2d 921 (1986). We do, however, address defendants' contention that *INS v. Pangilinan*, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988), bars federal courts from extending IRCA's application deadline.

Pangilinan concerned the Nationality Act of 1940 ("Act") making citizenship available to those aliens who served honorably in the United States Armed Forces during World War II. The program operated in the Philippines from August 1945 to a December 31, 1946 cutoff date. However, in response to the Philippine government's complaints of a manpower drain, the INS withdrew its naturalization officer from that country for nine months of that period. In 1948, Congress amended the Act to liberalize the citizenship program but specifically excluded Filipino servicemen from any further naturalization.

Nearly forty years after the expiration of the Act, sixteen Filipino nationals brought suit claiming that the nine-month hiatus violated the Act and that they were entitled to apply for and receive citizenship. Fourteen had taken no affirmative steps to be naturalized before the December 31, 1946 cutoff date. One had taken preliminary steps to obtain citizenship in the U.S. but did not complete his petition. The last had inquired at the American embassy before the cutoff date, but was told that there was no one there to assist him. The Ninth Circuit held for plaintiffs and, pursuant to its equitable powers, ordered their naturalization.

The Supreme Court reversed, holding that "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [congressional] limitations." *Pangilinan*, 486 U.S. at 885, 108 S.Ct. at 2217. The Court found that the December 31, 1946 cut-off date, coupled with the 1948 amendment specifically excluding Filipino servicemen from further naturalization, established a "congressional command." It held the Ninth Circuit's equitable powers insufficient to warrant the conferral of naturalization in the face of "a 'public policy established by Congress.'" *Id.* at 883, 108 S.Ct. at 2216 (quoting *INS v. Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973)).

We find the circumstances of *Pangilinan* distinguishable from the present case. In *Pangilinan*, the plaintiffs faced two hurdles neither of which is present here. The relief they sought--naturalization--was beyond the court's authority since

> the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers. *See, e.g.*, 28 U.S.C. § 1361; 28 U.S.C. § 1651. Rather, it has been

> given them as a specific function to be performed in strict compliance with the terms of an authorizing statute.

Pangilinan, 486 U.S. at 883-84, 108 S.Ct. at 2215-16. In this case, the plaintiffs seek only that we use our power to compel the INS to open its doors to their applications, with the chips thereafter to fall where they may.

Secondly, and ultimately determinative here, the mix of congressional purposes at issue are different from those in *Pangilinan* and thus, despite the surface similarities of the two cases, compel a different outcome. Defendants argue that IRCA's requirement that aliens apply "during the 12-month period beginning on a date ... designated by the Attorney General," 8 U.S.C. § 1255a(a)(1)(A), establishes a May 4, 1988 "cutoff date" analogous to the Nationality Act's December 31, 1946 deadline and that Congress reaffirmed this cutoff by failing to pass a 1988 amendment to extend the filing deadline. Thus they contend that, as in *Pangilinan*, congressional policies bar us from extending the filing deadline. The district court agreed, holding that "[i]n refusing to accept applications beyond that deadline, INS is enforcing the public policy established by Congress.... Under the analysis of *Pangilinan*, we may not compel INS to accept applications for amnesty after May 8 [*sic*], 1988." *Perales*, 762 F.Supp. at 1067.

More recently, the Ninth Circuit, considering a similar request to extend the IRCA deadline, found that "[i]n IRCA, Congress did not provide a specific cutoff date for amnesty applications. The Act establishes a twelve-month period for aliens to apply for amnesty. 8 U.S.C. § 1255a(a)(1)(A). It does not contain a specific deadline." *Catholic Social Services*, 956 F.2d at 922 (emphasis added). The court accordingly distinguished Pangilinan on the grounds that extending the deadline for those denied the full twelve months "effectuates, rather than frustrates, the public policy established by Congress." *Id.*

Briefly stated, we find the "cutoff date" versus "period" distinction an artificial one. While the Nationality Act of 1940 had a "cut-off date" of December 31, 1946, we might just as easily conclude that it described an application "period" of March, 1942 though December 31, 1946. *Pangilinan*, 486 U.S. at 877-79, 882, 108 S.Ct. at 2212-14, 2215. Similarly IRCA, as applied, fixed both a cutoff date of May 4, 1988, and a twelve-month application period. The question posed by Pangilinan is not whether IRCA establishes a cutoff date or an application period, but how to give recognition to the presence of both in light of congressional intent. More precisely, in this case we must determine whether, in the circumstances, extending the deadline to provide an effective twelve-month application period to aliens who would have applied in time but for unlawful INS actions would effectuate or undermine congressional intent.

In *Pangilinan*, the Court gave effect to congressional policies by enforcing the cutoff date. Congress, acting in response to the Philippine government's manpower drain complaint, had foreclosed *all* Filipino naturalizations after December 31, 1946. The amount of a given Filipino's access to the Act's original application period became irrelevant in light of the overriding congressional objectives which were served by strict observance of the Act's cutoff date. In failing to honor the cutoff, the Ninth Circuit's Pangilinan decision contravened expressed congressional will.

When carefully analyzed, however, the congressional purpose underlying IRCA leads us to a different conclusion than that reached in *Pangilinan*. At the outset, we note that IRCA's amnesty program sprang from a competing set of congressional priorities. On the one hand, Congress desired to exclude the large number of undocumented aliens who, having entered the country in direct violation of our laws, were adversely impacting U.S. labor and the economy. H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 52, *reprinted in*

1986 U.S.Code Cong. & Admin.News 5,649, 5,656. On the other hand, Congress acknowledged that "past failures to enforces [*sic*] the immigration laws have allowed [the aliens] to enter and to settle here," *id.* at 49, *reprinted in* 1986 U.S.Code Cong. & Admin. News 5,649, 5,653, and that many long-term undocumented aliens had "contributed to the United States in myriad ways, including providing their talents, labor and tax dollars," id. Congress further recognized that enforcement as to all illegal aliens was a practical impossibility. As the House Report explained: "the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage." *Id.* IRCA balanced these competing concerns. Employer sanctions removed economic incentives for further illegal immigration. At the same time, the amnesty program gave aliens of long-standing residence a twelve-month opportunity to apply for citizenship while conditioning applications on rigorous eligibility criteria including the "unlikely to become a public charge" standard at issue here.

The length of the application period figured importantly in this balance. Given that aliens "live in fear" and are afraid to come forward, H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 49, *reprinted in* 1986 U.S.Code Cong. & Admin.News 5,649, 5,653, integration of productive aliens required an ample application period during which they could come to understand the program. Consistent with this policy, Congress provided for the broad dissemination of information, 8 U.S.C. § 1255a(i) (1988), included a confidentiality provision, 8 U.S.C. § 1255a(c)(5) (1988), provided for QDE's to mediate between the aliens and the agency, and funded outreach services. Senator Simpson, a chief sponsor of the legislation, contending that aliens would come to understand the program, stressed the length of the application period: "each and every eligible alien will be aware of the requirements. There is enough time to do that--15 months--3 months after the date of enactment and then

another year [i.e. the 12-month application period]." 129 Cong.Rec. 12,814 (1983). As Senator Cranston pointed out: "The whole purpose of having a legalization program--to bring some of the presently undocumented workers into the mainstream--is undercut if overly stringent procedures prevent vast numbers of aliens from qualifying and intimidate many others from even applying." *Id.* at 12,810.

The congressional goal of finality also necessitated a generous twelve- month period. As the House Report stated: "The Committee intends that the legalization program should be implemented in a liberal and generous fashion.... Such implementation is necessary to ensure true resolution of the problem and to ensure that the program will be a one-time-only program." H.R.Rep. No. 682(I), 99th Cong., 2d Sess. 72, *reprinted in* 1986 U.S.Code Cong. & Admin.News 5,649, 5,676. Senator Simpson similarly emphasized that "the legalization program is intended to be a one-time only, one-time shot, *and to be carried out carefully over a 15-month period.*" 129 Cong.Rec. 12,811 (1983) (emphasis added).

By dissuading aliens who would otherwise have applied, the unlawful public charge regulations thus conflicted with congressional desires to integrate productive aliens and to achieve finality, both of which goals were dependent on the full 12-month application period. Congressional intent accordingly requires us to extend the filing deadline for such persons, so as to make effective the full twelve months. The present case is, in this respect, distinguishable from *Pangilinan* in which congressional policies required strict observance of the statutory cutoff date, but were indifferent to diminishment of the application period.[4]

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4 Congress' decision to leave the specific dates of IRCA's application period up to the Attorney General further evidences the relative insignificance of these dates. 8 U.S.C.

Defendants assert that the 1988 failure of an amendment to extend the application period should change our analysis. Proponents of the amendment ventilated concerns that aliens had not come forward due to fear, *see* 134 Cong.Rec. 9,291, 9,295-96 (1988) (remarks of Senators Kennedy and Gore), and due to confusion over the program requirements, *id*. Defendants argue that the rejection of these arguments signals a congressional intent to preclude the relief plaintiffs seek.

We find the 1988 debates consistent with our understanding of earlier congressional policy. From the outset, Congress recognized that fear and confusion would impede the amnesty process. To address these concerns, it included a confidentiality provision, 8 U.S.C. § 1255a(c)(5) (1988), a generous twelve-month period, 8 U.S.C. § 1255a(a)(1)(A) (1988), and other safeguards. Yet it intended for the twelve-month period to be final, even for those who for its duration remained too confused or afraid to come forward. Congress expressed its desire for finality by making timeliness an eligibility *requirement*, 8 U.S.C. § 1255a(a)(1)(A) (1988), and by precluding judicial or administrative review of individual denials for late filing, 8 U.S.C. § 1255a(f)(2) (1988). Legislators further made clear their belief that "legalization is an extraordinary benefit, an extraordinary grace" to which aliens have no entitlement if they fail to do their part in completing the application process. 129 Cong.Rec. 12,814 (1983) (remarks of Senator Simpson). Thus, whether we look to the 1988 debates, or the plain terms of the 1986 Act, we are convinced that

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§ 1255a(a)(1)(A). The focus of legislative debate was instead on the *length* of the application period. While the House bill initially suggested an 18-month filing period, negotiations with the Senate led to the establishment of a "12-month period beginning on a date ... designated by the Attorney General." *Id*.

aliens' fear or confusion could not now be grounds for extending the filing period.

At no point, however, did Congress intend to foreclose a remedy where unlawful *INS conduct* was the cause of aliens losing the benefit of the full twelve-month period. As early as 1983, Senator Simpson made clear that "[i]mplicit in these requirements and in this framework is the Committee's intent that the program be carried out firmly and fairly.... the legalization program is ... to be carried out carefully over a 15-month period." 129 Cong.Rec. 12,811 (1983). Far from altering this conception, the 1988 debates reaffirmed Congress' expectation that there would be equitable remedies for those actually harmed by unlawful INS activity. Senator Grassley, an opponent of the amendment, remarked that:

> the proponents argue that certain court decisions recently handed down now make some 75,000 persons eligible for the legislation program. There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well equipped to evaluate equitable considerations. The Senate need not enact a broad extension to accommodate certain litigants.

134 Cong.Rec. 9,295 (1988). No opponent suggested otherwise. They limited their remarks to cases in which the INS had acted lawfully. *See, e.g.*, 134 Cong.Rec. 9,293 (1983) (remarks of Senator Simpson) ("The INS went far beyond congressional requirements in publicizing this program. They went far beyond the requirements in publishing the regulations.... There is not a question out in the land people have not known exactly what we were doing here."). On this record, we conclude that neither in 1986, nor in 1988, did Congress intend to foreclose the availability of traditional equitable remedies for aliens who would have applied for amnesty but for unlawful INS regulations. To the extent that the unlawful public charge

regulations eviscerated the application period for certain aliens, we effectuate congressional intent by extending the filing deadline to provide them with a fully effective twelve months.

IV. *The claims of the governmental plaintiffs.*

The district court apparently rejected the claims of plaintiffs New York City and New York State. These plaintiffs properly noticed their appeal, but have neither briefed nor argued the merits of their claims before us. We therefore remand these claims to the district court for reconsideration in light of this opinion.

V. *Order of Relief.*

We vacate the district court's judgment. On remand, we instruct the district court to provide permanent injunctive relief that will:

(1) Require defendants to disseminate, consistent with the terms of 8 U.S.C. § 1255a(i), information regarding the effect of this decision on illegal aliens who were living in New York State between May 5, 1987 and May 4, 1988.

(2) Enjoin defendants, for a one-year period following the issuance of the injunction, from refusing to accept applications from members of plaintiffs' class for adjustment to temporary resident status, and require them to treat such applications as having been timely filed. In connection with the application, however, each applicant should be required to submit adequate proof that at some point prior to May 4, 1988 the applicant was aware of the policies contained in the INS' unlawful public charge regulations and that but for this awareness the applicant would have filed a timely application for adjustment of status. The failure to provide such proof may constitute an independent basis for denial of the application. After hearing the parties, the district court may determine the specific nature of the proof required. Individual INS determinations upon each application, including

determinations as to the sufficiency of proof of deterrence, would then be subject to the review procedures specified at 8 U.S.C. § 1255a(f)(1)(3) and (4).

Finally, we note plaintiffs' request that defendants be required to reopen and readjudicate all New York State temporary resident status applications denied on public charge grounds. We agree that these applications should be readjudicated in accordance with the public charge regulations as amended in November of 1987 and July of 1989. However, we understand that this has already occurred pursuant to the July 21, 1989 Stipulation and Order. To the extent that any such applications have not been readjudicated pursuant to the Stipulation and Order, the injunction should include relief to this effect.

CONCLUSION

We reverse the decision of the district court, and remand for further proceedings in accordance with this opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 88 Civ. 2265 (KC)

CESAR PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK,

AND

SARA DOE, JANE ROE, AND ANNE COE, INDIVIDUALLY, ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS,

AND

FRAN FOE, MARY MOE, LINDA LOE, SUSAN SOE AND ZELDA ZOE, INDIVIDUALLY, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-INTERVENORS,

v.

RICHARD THORNBURGH, AS ATTORNEY GENERAL OF THE UNITED STATES, TERRANCE O'REILLY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE, GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR, SCOTT BLACKMAN AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, AND LOUIS SULLIVAN, AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS.

OPINION AND ORDER

Kenneth Conboy, District Judge:

This action was filed barely a month before the expiration of a one-year period of amnesty for undocumented aliens which had been authorized by the Congress in landmark immigration legislation. The plaintiffs here claim, in substance, that certain regulations issued by the Attorney General to implement the legislation were constitutionally and statutorily defective, causing a deprivation of their rights. Proceeding initially by order to show cause, they asked the Court to extend the deadline, notwithstanding the clear expression of the Congress--both in enacting the legislation and in later refusing to extend the deadline--that the rights conferred by the statute would expire on May 4, 1988. This we declined to do, ruling that, under the doctrines of equitable tolling and constructive filing, the plaintiffs could obtain the relief being sought if they could establish at trial the merits of their attack on the regulations and either affirmative misconduct by the Government or sufficiently concrete and definitive steps taken by the plaintiff aliens to apply for the benefits before the expiration of the filing deadline. A trial having been had, we conclude, principally, that plaintiffs have failed to establish the merits of their statutory and regulatory claims. Even if those claims were established, plaintiffs have not shown either affirmative misconduct by the Government, which would permit application of the doctrine of equitable tolling of the deadline, or constructive filing by the alien plaintiffs before the expiration of the deadline. We now elaborate upon these conclusions.

This class action challenges certain aspects of the administration by the Immigration and Naturalization Service ("INS") of the legalization program created by the Immigration Reform and Control Act of 1986, Title II, § 201(a), Pub.L. No. 99-603, 100 Stat. 3394 et seq. ("IRCA",

"the Statute", or "the Act"), codified primarily at Section 245a of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. § 1255a (1988). The regulations in question relate to the "public charge" ground of exclusion from the legalization program. Generally, if an applicant was found to be likely to become a public charge, he could be found ineligible for the benefits created by the statute. Plaintiffs--individual aliens, class representatives, and governmental entities--allege that INS's public charge regulations were unlawfully restrictive, that INS disseminated these defective regulatory standards to the public, and that, as a result, eligible aliens disqualified themselves from the legalization program. Plaintiffs allege violations of IRCA, the Administrative Procedure Act ("APA"), 5 U.S.C. ss 552 et seq. (1986),[1] and the Fifth Amendment to the United States Constitution. Plaintiffs seek declaratory, injunctive and mandamus relief.

The Government denies these allegations, disputes the justiciability of this action, the standing of the governmental plaintiffs, and the Court's subject matter jurisdiction, and maintains that the Court does not have the authority to grant the relief sought by the plaintiffs.

After pretrial proceedings, described below, the case was tried without a jury from October 9 through October 17, 1990. The parties filed post-trial briefs on December 5, 1990, and further letter advice on February 22, 1991. This opinion and order constitutes the Court's findings of fact and conclusions of law.

I. *Statutory and Regulatory Background*

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1 Although a violation of the APA is conclusorily alleged in the complaint, plaintiffs have not pursued this allegation, either in pre-trial proceedings or at trial, focussing instead on the alleged violations of IRCA and the Constitution. Accordingly, we deem plaintiffs to have abandoned this theory of liability, and we do not address it further.

IRCA became law on November 6, 1986. It was the result of a protracted and complex national debate on immigration policy that acknowledged the existence in this country of a large population of undocumented aliens and the pervasive impact of this population upon America's agricultural economy, migrant labor conditions, and urban landscape. Ever growing social welfare expenditures by states, like New York, California, Texas and Florida, with large concentrations of illegal aliens, were a significant factor in developing the political consensus that led to the passage of the legislation. In essence, the statute sought to deal a) with illegal aliens already in the country, by giving them a one-year amnesty period to qualify for lawful status, thereby drawing them out of outlaw status and an economic and legal no-man's land, and b) with future illegal aliens, by making it unlawful for United States employers to hire undocumented persons who are not legally authorized to work, thereby creating disincentives to future migration. American agricultural workers stood to benefit from this new policy because they would no longer lose jobs to illegal aliens laboring at sub-standard wages. Another beneficiary would be American cities and counties, whose social welfare obligations to a large alien constituency would decrease as aliens surfaced and joined the mainstream economy or declined to immigrate because of a shrinking job market.

The statute established a legalization program for qualified aliens who had resided in the United States unlawfully since before January 1, 1982, and required the Attorney General to designate a twelve-month period during which prospective legalization applicants could apply for legalization. 8 U.S.C. § 1255(a)(1)(A). Because the Congress required the Attorney General to start the twelve-month application period on a date not later than 180 days after November 6, 1986, id., it appears that Congress intended to foreclose any applications for benefits filed after May 4, 1988. The Attorney General

designated May 5, 1987, through May 4, 1988 as the twelve-month application period. 8 C.F.R. § 245a.2(a)(1).

Congress specified certain formal requirements that an applicant for legalization had to satisfy. Under IRCA, an illegal alien could adjust his status to that of a lawful permanent resident if he could prove that he had: (1) made a timely application, (2) resided in the United States since before January 1, 1982, (3) resided here continuously since the enactment of the statute in November 1986, and (4) was admissible as an immigrant. 8 U.S.C. § 1255a(a)(1)-(4). As is customary, Congress delegated to the Attorney General authority to issue detailed regulations that would govern implementation of the Act. 8 U.S.C. § 1255a(g)(1).

During the long Congressional debate that preceded enactment of IRCA, advocacy groups for the alien population argued that, because of mistrust of the INS endemic in the immigrant population, a buffer had to be created between the alien and the Government if the legalization program was to succeed. Accordingly, to facilitate its effort to reach the large number of potential but hidden beneficiaries of IRCA, INS certified, pursuant to 8 U.S.C. § 1255a(c) & (i), approximately twelve hundred private organizations as "Qualified Designated Entities" ("QDEs"). They were classified in two categories: "National Coordinating Agencies" ("NCAs") and "Direct Service Providers" ("DSPs").

INS entered into a written agreement with each NCA which required the NCA to cooperate and coordinate with INS in the training of DSPs, both initially and on an as-needed basis, to provide technical assistance to DSP sites, to distribute public information materials prepared by the INS for the legalization program, to participate in the INS Outreach training program and to provide instruction to non-affiliated Service Providers and other community organizations as necessary. INS also entered into a written agreement with each DSP which required the

DSP to distribute forms and provide information regarding legalization eligibility requirements to interested persons, to review legalization applications and assist prospective legalization claimants, and to publicize the availability of the DSPs' services through local media, churches, schools and community organizations.

These written agreements with the QDEs contemplated that the INS would provide technical training and assistance to DSPs; provide, initially and on an as- needed basis, formal training sessions and materials to NCAs, their affiliates and independent DSPs; and monitor the quality of the services being provided through the QDEs. INS certified over sixty organizations in New York State as QDEs.

Beginning on January 20, 1987, INS issued and disseminated to the public the regulations that would govern eligibility for legalization, including a "public charge" ground of exclusion from the legalization program. These public charge regulations are at the heart of this case.

IRCA's requirement that legalization candidates be "admissible as immigrans," 8 U.S.C. § 1255a(a)(4), refers to and incorporates the exclusion provisions of Section 212(a) of the Immigration and Nationality Act of 1952, as amended ("INA"). One class of aliens not "admissible as immigrants" under INA Section 212(a) is the class of aliens who, "in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges." Section 212(a)(15) of the INA, 8 U.S.C. § 1182(a)(15). Thus, Congress's requirement in IRCA that a legalization applicant prove that he is "admissible as an immigrant," 8 U.S.C. § 1255a(a)(4), requires the Attorney General or his designee to make a determination regarding an alien's ability to be self-supporting in the United States.

For IRCA legalization applicants, Congress also created certain exceptions to the general provisions of 8

U.S.C. § 1182(a)(15) and provided a "Special Rule for Determination of Public Charge" (the "Special Rule"). The Special Rule states:

> An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this title [the "public charge" exclusion] if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 U.S.C. § 1255a(d)(2)(B)(iii) (emphasis added). In addition, Congress provided that the Attorney General could waive the public charge ground of exclusion "in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." 8 U.S.C. § 1255a(d)(2)(B)(i).

As required by the statute, 8 U.S.C. § 1255a(g)(1)(B), and the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the INS promulgated regulations to implement IRCA. A Notice of Proposed Rule Making was published in the Federal Register on March 19, 1987, 52 Fed.Reg. 8752 et seq. (1987), and final regulations were published on May 1, 1987, 52 Fed.Reg. 16205 et seq. (1987), codified at 8 C.F.R. § 245a. These regulations, inter alia, defined the criteria used by the INS to evaluate an alien's ability to demonstrate that he would not become a public charge if granted temporary residence.

The IRCA implementing regulation headed "proof of financial responsibility" provided:

> An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the [INA] ... unless the applicant demonstrates a history of employment in the United States evidencing self- support without receipt of public cash assistance. Generally, the evidence of employment submitted under

> paragraph (d)(3)(i) of this section [to establish proof of the requisite period of continuous residence necessary to qualify for legalization under IRCA] will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment.

8 C.F.R. §245a.2(d)(4) (1987).

The regulations implementing IRCA's Special Rule (see *supra* at 1041) provided:

> An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section [relating to waivers of grounds of exclusion under 8 U.S.C. § 1255a (d)(2)(B)(i)]. The alien's employment history ... should be continuous in the sense that the alien shall be regularly attached to the work force, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering

> applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

52 Fed.Reg. 16212 (May 1, 1987), codified at 8 C.F.R. §245a.2(k)(4) (1987). In November 1987, this regulation was amended to eliminate the reference to waivers under paragraph (k)(2). 52 Fed.Reg. 43844 (November 17, 1987).

"Public cash assistance" was defined by the regulations as:

> income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family through federal, state, or local programs designed to meet subsistence levels.

8 C.F.R. §245a.1(i) (1988).

Just before the amnesty program began, the INS, responding to comments, inquiries, and criticisms of its proposed public charge regulations, emphasized that "applicants may in fact be ineligible for legalization if such cash assistance was received by their U.S. citizen children." 52 Fed.Reg. 16207 (May 1, 1987) (emphasis added).

On September 23, 1987, in a memorandum entitled "Guidelines for Determining Public Charge Issues under Legislative Provisions of the Immigration Reform and Control Act of 1986 (IRCA)", the INS promulgated further relevant guidelines:

> Proof of financial responsibility under 8 C.F.R.§245a.2(d)(4) is to be established by examining *the totality of the alien's circumstances* at the time of his or her application for legalization. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The

> determination of financial responsibility should be a prospective evaluation based on the alien's age, health, income and vocation.

Pl.Ex. 9 (memorandum dated September 23, 1987, from Richard E. Norton, Associate Commissioner, to Regional Commissioners).

On October 1, 1987, the INS issued a memorandum providing an example of when a waiver of the public charge provision might be available for those not otherwise eligible for qualification under the "Special Rule":

> Waivers may be accepted in the case of applicants who have had extenuating circumstances which necessitated reliance on public cash assistance in the past, but for whom the likelihood of relying on public cash assistance in the future appears non-existent.

Pl.Ex. 11 (memorandum entitled "Waivers, Section 212(a)(15)", dated October 1, 1987, from Richard E. Norton, Associate Commissioner of INS to Edward J. Wildblood, Regional Legalization Officer of the Eastern Region).

On November 23, 1987 INS addressed the issue of public cash assistance paid to an applicant's family members in the form of Supplemental Security Income ("SSI") benefits:

> For purposes of evaluating proof of financial responsibility under 8 C.F.R.§245a.2(d)(4), SSI should be considered as public cash assistance only with regard to the person who receives it. SSI should not be attributed as public cash assistance to the immediate family members who reside with the recipient but who themselves are non-recipients.

Pl.Ex. 14 (memorandum dated November 23, 1987, from INS Associate Commissioner Richard E. Norton to INS Regional Commissioners).

On February 12, 1988, Assistant INS Commissioner William S. Slattery, in a letter to John M. Payne, a senior official of the Department of Human Services of the District of Columbia (the "Slattery letter"), addressed the question of whether receipt of Aid to Families With Dependent Children ("AFDC") benefits would render an applicant ineligible for legalization. He wrote, "Public charge status is not conveyed to the parent- payee *if the United States citizen child is the recipient*." Pl.Ex. 18 (emphasis added). On February 26, 1988, INS Commissioner Alan C. Nelson wrote to Ruth Massinga and Marlin Johnson of the American Public Welfare Association ("APWA") and repeated the advice that receipt of AFDC benefits by a child would not render a parent ineligible for legalization. Pl.Ex. 20.

II. *Prior Proceedings in this Action*

Plaintiffs filed their complaint on April 1, 1988, approximately one month prior to the expiration of the deadline for filing amnesty applications. The complaint[2] asserts that INS "adopted and published unlawfully restrictive regulations on the so-called 'public charge' ground of exclusion," Complt.¶4, that "unlawfully classified thousands of economically productive, self-supporting aliens as 'likely to become public charges'--and excluded them from legalization--merely because the aliens' citizen or permanent resident dependents lawfully receive or have received public assistance." Complt.¶6. The complaint further alleges that the "challenged regulations directly contravene the Immigration Reform and Control

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2 References are to the First Amended Class Action Complaint, filed on March 15, 1990.

Act, which expressly provides that an alien must not be denied legalization on 'public charge' grounds if she or he can demonstrate the capacity for self-support." Complt.¶8 (citing 8 U.S.C. ss 1255a(a), 1255a(d)(2)(B)(iii)). The complaint goes on to assert that, as early as December 1987, high INS officials took the internal position--contrary to INS's published regulations--that the receipt of public cash assistance by the U.S. citizen children of an undocumented alien is not relevant to the determination of the alien's eligibility for legalization. Complt.¶13. The complaint then makes reference to the aforementioned February 12, 1988, letter of Commissioner Slattery. Id. Finally, the complaint alleges that INS's failure to amend its unlawful "public charge" regulations or otherwise notify the public of the "altered eligibility standards" evidenced by the Slattery letter unfairly deterred large numbers of qualified aliens from filing for legalization. Complt.¶18.

The individual plaintiffs sought to represent a class composed of:

> (a) all undocumented aliens residing in New York State who may be excludable from the Legalization Program established by [IRCA] as "likely to become public charges" based in whole or in part upon the receipt of public cash assistance by the applicants' U.S. citizen or legal permanent resident dependents, and (b) all undocumented aliens residing in New York State who either failed to apply for legalization by May 4, 1988, or who abandoned their applications, because they believed that they were ineligible on "public charge" grounds.

Complt.¶28. This class of similarly situated aliens assertedly exceeds five hundred in number. Complt.¶29.

Plaintiffs sought immediate injunctive relief, including judicial extension of the May 4, 1988 filing deadline, the promulgation and publication of clarified regulations on the relevance of AFDC assistance to public charge determination, and the ordering of INS to accept legalization applications from affected aliens for a full twelve-month period following publication of the clarified regulations in the Federal Register.

After several hearings on the matter, the Court, on April 19, 1988, obtained the Government's commitment to publish formally, on a nationwide basis, the substance of the Slattery formulation of the AFDC/public charge issue. We declined on that date to issue the temporary restraining order requested by the plaintiffs. Order dated April 19, 1988.

Two days later, on April 21, 1988, INS Associate Commissioner Norton distributed to all regional offices across the country a detailed and formal memorandum on the effect of the receipt of AFDC benefits on eligibility for legalization. The purpose of the memorandum was to "reiterate the policy" on the matter. Pl.Ex. 25. It stated as follows:

> As a general rule, the receipt of AFDC benefits by a member of the legalization applicant's family is not attributed to the applicant for purposes of determining the likelihood that the applicant will become a public charge.... If, however, the family is reliant on the AFDC benefits as its sole means of support, the legalization applicant may be considered to have received public cash assistance. This determination must be made on a case by case basis and upon consideration of the totality of the applicant's circumstances.

Id.

The plaintiffs nonetheless pressed for a preliminary injunction on the ground that the clarification came too late in the amnesty period to benefit those who, but for reliance on the assertedly misleading published regulations, would have sought legalization status. In other words, plaintiffs argued that members of their class, whose United States born children had received AFDC benefits, had self-disqualified themselves on the mistaken belief that such benefits operated to disqualify them automatically as likely to become a public charge, despite the totality of circumstances, the Special Rule and the availability of a waiver.

We denied plaintiffs' application for a preliminary injunction, concluding that "the rights of all the parties can be adequately protected through a systematic and fact oriented trial on the merits, followed by the exercise of the administrative authority of the Commissioner [of INS] and the equitable power of the Court if the record justifies it." Order dated April 26, 1988. In so ruling, the Court invited the plaintiffs to demonstrate that each had constructively filed an application for legalization prior to the May 4, 1988 deadline by taking some definitive steps to pursue legalization, but had not formally applied because of misinformation about "public charge" regulations wrongfully given to them by INS. We further invited those who could not show constructive filing to demonstrate a right to an equitable tolling of the May 4, 1988 deadline based upon Government misconduct. On May 19, 1988 the Court of Appeals affirmed the denial of the preliminary injunction. 847 F.2d 55 (2d Cir.1988).

On May 17, 1988, three pseudonymous individuals filed motions to intervene in this case. Unlike the original individual plaintiffs, these aliens did not file applications before the May 4, 1988 deadline. In June 1988, the same three moved for a preliminary injunction compelling the INS to grant them work authorizations pending the

outcome of the case. The motion was withdrawn after INS agreed to provide temporary work authorizations to the three proposed intervenors. On June 28, 1988, plaintiffs moved for partial summary judgment declaring that 1) defendants' "public charge" regulations facially violate IRCA and the Equal Protection component of the 5th Amendment, 2) defendants' failure to disseminate accurate eligibility standards, their shifting interpretations of the public charge standards, and their issuance of misleading and ambiguous regulations violated the Due Process clause of the 5th Amendment and IRCA, and 3) members of the proposed class who can show that they were deterred from applying for amnesty are entitled to equitable tolling of the May 4 deadline. The INS cross-moved for summary judgment dismissing the complaint. Subsequently, plaintiffs moved, pursuant to Fed.R.Civ.P. 23(b), for certification of the class defined in the complaint (see supra at 1043). By order dated March 29, 1989 we denied the motions for summary judgment and granted the motions for intervention and class certification.

III. *The Trial*

A. The Alien Witnesses

The plaintiffs called seven alien witnesses, six of whom were class members.

Connie Loe testified that she was born in El Salvador, had lived in the United States for nine years, and had obtained permanent residence status through the amnesty program. Tr. 356.[3] She stated that she had heard the amnesty program discussed on radio station WADO and television channel 41 or 47,[4] and went to an organization known as the Concerned Citizens of Queens,

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3 References to the Trial Transcript will be cited as Tr. ——.

4 Radio station WADO and television channels 41 and 47 are Spanish-language stations.

a QDE, with her children other than her daughter, Linda Loe, to pursue amnesty. Tr. 357-360. Her daughter Linda did not "attend to her appointments at Concerned Citizens of Queens" because "we had heard that parents whose children had received welfare could not apply for amnesty," Tr. 360, and Linda's U.S. citizen children had received welfare. Connie Loe had heard this, shortly after the amnesty period began, on a WADO radio program, on which a representative of the "Immigration Department" answered phoned-in questions from the public. It was then that she heard this person state that "people whose children were on welfare could not apply for amnesty." Furthermore, this person, who was a woman, said nothing about a waiver. Tr. 361-62. Ms. Loe testified that she telephoned her daughter Linda that day and told her "that possibly she [Linda] could not apply for amnesty because her [Linda's] children were receiving public assistance." At Concerned Citizens of Queens, Connie Loe discussed her daughter Linda's case with "the person who was helping me fill out my application," and "asked him whether my daughter whose children were receiving public assistance could apply and he said no." Tr. 363. She was referred to a lawyer at that point, a Ms. Zambrana, and was told that her daughter could not "apply for amnesty" unless she took her children off welfare. No mention was made of a waiver. Ms. Connie Loe then relayed this information to her daughter Linda. Tr. 364-65.

On cross-examination, Connie Loe stated that references she had seen in the Spanish language newspaper El Diario to the receipt of welfare issue did not contain any interviews or statements of government officials. Tr. 371. She further stated that neither she nor her daughter Linda ever contacted anybody at INS about Linda's eligibility for amnesty. Tr. 373. When asked whether she would have advised her daughter to pursue amnesty if there was a possibility of approval in spite of having children on welfare, Ms. Loe said she would have advised it only if

amnesty "had been guaranteed." Tr. 376. The reason for this position, the witness explained, was her fear that her daughter could be deported based upon submitting an amnesty application. She communicated this fear to her daughter, and Linda "was afraid she would be deported if she applied." Tr. 377. The witness did not assert that this egregiously false information,[5] so sadly at odds with the central message of the national amnesty campaign promoted by the Government and the QDEs, came from any Government official or QDE functionary.

Linda Loe, daughter of Connie Loe, testified that she was born in El Salvador and has four children, all of whom were born in New York; that she came to the United States in 1980 and married an American citizen in 1982; that she left her husband in 1984; and that, from that time until May 1988, she was almost always employed. Tr. 384-87. She stated that though her children have received public cash assistance, she herself has never received it. Tr. 388. Ms. Loe further stated that she had heard, on a call-in television program on channel 41 or 47, a male representative of the Immigration Service state that a parent whose children were receiving public assistance could not apply for amnesty. Tr. 391. She stated that she also heard this on radio station WADO, at about the same time. Tr. 392. At this point she asked her mother to inquire about the matter at the Concerned Citizens of Queens. After being advised by her mother of the negative advice from the Concerned Citizens, she went there herself in October or November 1987. Tr. 394-95. The witness stated, "I spoke to the receptionist and asked her to speak to the lawyer to see whether I could get some information [and was told] that in order to speak with the lawyer, I

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5 IRCA's confidentiality provision, 8 U.S.C. § 1255a(c)(5), prevents the INS from using the information furnished pursuant to an amnesty application in deportation proceedings.

had to pay a certain amount in order to get the information." Tr. 395. She did not do so "since I had already obtained the same information from the same place." Tr. 395. At about the same time, she also spoke on the telephone for "about half an hour" with a representative of the City of New York and was told "I could not apply for amnesty, if I had some other way out or some way to apply for papers, okay. But I could not get amnesty." Tr. 396.

On cross-examination, Ms. Loe conceded that she never spoke with anyone at INS about her problem. Tr. 399. She further asserted that in her telephone conversation with the New York City representative she was told that she could be deported based upon her application for amnesty. Tr. 402. Based upon that advice and like information from "family members" and "people sometimes close to [her]," she feared deportation. Tr. 401.

Maria P. testified that she was born in the Dominican Republic, entered the country illegally across the Texas border, has been living in the United States for ten years, has two United States born children, and had been employed for most of the period between her entry into the country and May 1988. Tr. 407-10. She said she had not applied for amnesty "[b]ecause my daughter was receiving public assistance and they were saying that people whose children were receiving public assistance could not apply." Tr. 411. When asked who told her that, she said "The news and people who were talking. At that time a lot of people were talking and I heard a lot of them say that." Id. When her attention was directed to a Mr. Julio Hernandez, the witness stated that in July 1987 she went to his Church and was advised by him "that I couldn't apply [for amnesty] because I had my little girl on public assistance." Tr. 412. He gave her this advice "frequently". Tr. 413. On cross-examination, Maria P.

stated that she did not make further inquiry of anyone. Tr. 415-16.

Jenny C. testified that she was born in Colombia, entered the United States illegally through San Diego, has lived here nine years, has one child who was born in New York, and was employed for all but a year of the period since her arrival in the United States. Tr. 422-24. She knew of the amnesty program, but did not apply "[b]ecause I began to hear people saying that all people who were receiving public assistance could not apply." Tr. 424. She stated that in May 1987 she heard a journalist say on Channel 41 that "those persons who had arrived before '82 had a right to apply, but those that had received public assistance did not have a right to apply." Tr. 425. On radio station WADO, she heard another journalist say "something like the fellow said on television, that any person who received public assistance could not apply." Tr. 426. She heard the same thing from an unidentified friend speaking in the street who showed her an INS printed notice, Pl.Ex. 30, which advised temporary residents under the IRCA program that, to achieve permanent residence, the applicant must not receive certain types of public cash assistance and must not become a public charge. Tr. 427-28. After this conversation with her friend, she did not seek advice from anybody about whether or not she might be eligible for amnesty "because that paper was from immigration so I was sure that I could not apply." Tr. 428. The public assistance benefits she received were Medicaid and Women, Infants and Children ("WIC"), in connection with her pregnancy. Tr. 429. On cross-examination, Jenny C. conceded that she never tried to contact anybody from the government for clarification on her eligibility for amnesty. Tr. 434-35. Nor, although she was aware of the existence of community organizations assisting in the amnesty program, did she seek clarification from those sources. Tr. 435.

Sonia R. testified that she was born in Honduras, has lived in the United States for almost ten years, and has one American born child. She crossed the United States border illegally into Nogales, Arizona. Tr. 442-43. For all but five months up until May 1988, Sonia R. was employed. Tr. 444. Because she "had already had assistance"--she had received Medicaid and WIC benefits in connection with her pregnancy--she did not apply for amnesty. Tr. 445. She based her decision on a program she heard on Channel 41 "before people applied ... before they started the applications." Tr. 445. The program included, among others, representatives of the "Department of Immigration". Tr. 446. According to Sonia R., a caller stated he or she was receiving assistance and "the person" on the program said that such persons could not apply. Tr. 447. She stated that the only affirmative step she took to pursue her interest in the amnesty program was to go to a law school in Brooklyn, but the record is unclear as to what transpired as a result of this visit. Tr. 447-48. On cross-examination, the witness conceded that she never sought clarification on the issue of receiving public assistance from any government official. Tr. 455.

Rosa C. testified that she was born in Santo Domingo, came into the United States illegally at San Diego, has lived here since 1981, and is the parent of two New York born children. Tr. 457. She has been largely self- supporting, and, although she knew of the amnesty program, she did not apply "because people were saying that people who were receiving assistance for their children could not apply." Tr. 459-60. She heard this on Channel 47 or 41, on which a person from the Immigration Service appeared. "Someone called in and asked whether persons whose children were receiving public assistance would qualify and he [the representative from the Immigration Service] answered no." Tr. 461. No further explanation was given on this topic. Tr. 462. She also heard advice to the same effect on an unspecified radio program. Tr. 462-

63. On cross-examination, Ms. C. conceded that she had not spoken to anybody about her amnesty program, even though she knew that various community organizations existed to help people file applications for amnesty. Tr. 466. Nor did she ever contact the INS. Tr. 470.

Miriam B. was born in Trinidad, entered the United States legally on a visa but remained beyond her authorized stay, and is the parent of two children born here. She has been in large measure self-supporting since her arrival in the country. She testified that she did not apply for amnesty because she had seen a television program on Channel 7 on which there were, among others, "people from the Immigration Department.... The program was a panel discussion and they said that persons who received welfare for their children were not eligible.... Everybody [on the program] agreed that that was the case." Tr. 477. Ms. B. later went to a Catholic organization in Englewood, New Jersey and spoke to a nun there. "I asked her if my son received welfare, if I was eligible for the amnesty program, and she told me no." Miriam B. then went to a private lawyer, who told her she could not qualify for amnesty because "her son was on welfare." Tr. 478-82. Finally, Miriam B. spoke to a priest at a Catholic organization in a church in Harlem, and he told her she was ineligible "because my son received welfare." She was also told that "my chances of getting [amnesty] with the waiver was like the same thing, next to nothing." Tr. 483.

B. INS Witnesses

Terrance O'Reilly testified that, at the time of the amnesty program, he was Deputy Assistant Commissioner for Legalization under IRCA. To advise the public through the radio, television and print media about the standards and benefits of IRCA, INS paid $10.6 million to public relations firms. Tr. 765. It enlisted the support of the American Immigration Lawyers Association, the American

Bar Association, a National Coordinating Agency for voluntary groups across the country, and the National QDEs. Press conferences and seminars were routinely held and organized. Tr. 766. Flyers, fact sheets, posters, bill inserts, transit ads, balloons, buttons and radio tapes were produced and distributed on a multi-lingual basis during the amnesty period. Gov. Ex. L. A national toll-free hotline was set up to disseminate application information. Tr. 767.

The QDEs, numbering approximately 1200 nationwide, were created under the statute to act as a buffer between the INS and the alien population, but in fact 75% of all applicants during the amnesty period applied directly to INS rather than through the QDEs or private attorneys. Tr. 767- 68. When asked to explain this, Mr. O'Reilly testified:

> It is our belief at central office that we tried to have a very fair, very open program. And we felt that if we could get the people to trust us at INS, that we weren't running a big sting operation, that they would come directly to us. Once we started working the people through the process and once people started getting out on the street with the temporary residence cards and went out and showed their buddies that hey, look what I got from INS, it seemed to work real well. People believed us. They believed their friends. So the population started coming directly to us.

Tr. 768. INS opened 107 legalization offices nationwide, and four regional processing centers. Tr. 768-69.

Commissioner O'Reilly testified that it was never INS's policy to consider receipt of public cash assistance by an applicant's immediate family members, citizen family members, as rendering the applicant automatically ineligible for legalization. Tr. 773. He went on to explain

that "if there was receipt of any sort of assistance by the citizen child, we viewed that at central office as a tool that should be used to maybe look further at whether or not this alien may be likely to become a public charge [in the future]. More as an indicator that there may be some questions about this person's financial responsibility." Tr. 774. This policy was disseminated by the Service throughout the nation. *Id.*

When asked to review Pl.Ex. 9, the Norton memorandum of September 23, 1987, see supra at 1042, Commissioner O'Reilly testified that it did not in any way represent a change in the regulations, but was merely a clarification containing more specific guidance for INS's regional offices. Tr. 774-75. He further indicated that Pl.Ex. 14, the Norton memorandum of November 23, 1987, see supra at 1042, also did not alter, but merely clarified, the regulations. Tr. 776. He testified to the same effect with respect to Pl.Ex. 25, the Norton memorandum of April 21, 1988, see supra at 1043-44. Tr. 776. He also asserted that Pl.Ex. 18, the Slattery letter of February 12, 1988 to John M. Payne, see supra at 1042-43, reflected no deviation from or modification of the Service's policy regarding the effect of receipt of AFDC funds on legalization. Tr. 780-81.

The legalization program received approximately 1.76 million applications during the one-year entitlement period. The planning assumptions and expectations of INS prior to the opening of the amnesty period was for 2 million applications. Thus, this represented an 88% response rate. In March 1988, the Service announced that, as of April 4, 1988, it would accept skeletal applications without documentation and issue immediate work authorizations, to afford all possible applicants an opportunity to meet the May 4 deadline, with an additional 60 days post-deadline to assemble and complete the application. Gov. Ex. O. This announcement

received broad national media attention and resulted in the filing of 170,000 applications during the last three days of the program. Tr. 786. On cross-examination, Commissioner O'Reilly admitted that Pl.Ex. 18, the Slattery letter, could be interpreted as a change in policy. Nevertheless, the Commissioner maintained that, throughout the amnesty period, the public charge determination was based on the totality of the circumstances. Tr. 801.

Mr. O'Reilly's superior, William Slattery, the Assistant Commissioner for Legalization during the relevant period, had a major administrative role in organizing the Service's national effort to disseminate information and stimulate large numbers of applications. Tr. 820, 822-824. He took sixty- three trips during the one-year application period, including one to the Dominican Republic, during which he did seventeen television shows. He rode an elephant in the Washington, D.C. St. Patrick's Day Parade, and marched in Brooklyn's West Indian Day Parade. In New York, he did "a lot of Irish radio, [interviews with] ethnic newspapers [and three appearances] on Asian T.V. in New York". Tr. 825.

Commissioner Slattery's testimony on the QDEs' role in actually persuading aliens to come forward and file applications is sufficiently instructive to warrant quotation at length:

> Q. And could you explain a little bit what your involvement with the QDEs and NCAs was?
>
> A. The QDEs is an abbreviation for Qualified Designated Entities. And this is nomenclature which didn't exist or at least not to my knowledge before the passage of IRCA. It was created in the Immigration Reform and Control Act. Most of the individuals that became known as QDEs were previously either NCAs or volunteer agencies. And

they came into existence, my understanding is, based upon representations that they had made that the aliens would not deal directly with the government, that there needed to be an intermediary, a buffer. As a result, they were provided for in the statute.

There was a role provided for them in the statute whereby they would perform that function. They would be an intermediary between the alien population and the INS. So as a result, I had to meet with them because they were going to perform a role whereby they could receive applications from the aliens and then deliver the applications to the INS.

Indeed, at the beginning of the program, they had represented to the INS--I don't know what they represented to the Congress--they certainly represented to the INS that they had millions of aliens already pre-registered for the benefit. So they had already had contact with them. They had already established a way of communicating with them and that they were prepared to bring these people in to INS for the benefit.

It was in my best interest to meet with them since they had the pool of beneficiaries.

Q. Was that representation with respect to millions of applicants ever made directly to you?

A. Yes, yes, absolutely. When I would meet with them initially, I started meeting every week and then later on it was every two weeks, and eventually I think once a month. But the representations of the numbers were made two fold: One, when they met with me, they would talk about the numbers of people they had and two, many of them put a request in for advanced

funding. Just as I had to borrow $125 million from the appropriated funds of the Immigration Service to start and to get up to where I could do business, they came to the Immigration Service and they asked for advanced funding.

I don't remember how much money each one asked for, but the largest one was U.S. Catholic Conference. They asked for 1.2 million based upon a dollar per head for everybody they already had registered. So they put a written request in and told us they had 1.2 million people lined up and they wanted that advance. They were to pay it back off when they submitted an application. The QDEs were going to generate about $15 or $16 per application. We were going to deduct one dollar for every application we paid them for until we got the $1.2 million back. That application went to Mr. Duarte.

After a good deal of discussion, they granted Catholic Conference $800,000. They said, "We are not quite sure you have got 1.2 million. Based upon what you are giving us, we will give you $800,000."

Q. Was that Mr. Duarte when you say "they granted"?

A. Yes, and I believe he worked with Mr. Norton on it. I wasn't involved in that grant. $800,000 did go out as start up to Catholic Conference.

THE COURT: How many ultimately did the U.S. Catholic Conference process for the INS?

THE WITNESS: They failed miserably, but I think it was less than 100,000.

THE COURT: What kind of representations were made when the Catholic Conference said it had 1.2

million? What documentation was submitted to support that?

THE WITNESS: I don't know the quality of the documentation or the degree of the documentation, but they represented these individuals were all pre-registered with the Catholic Conference.

THE COURT: A pre-register implies a record of some kind?

THE WITNESS: Yes, I can only tell you that Monsignor de Marzio was head of The Catholic Conference nationwide. And after we advanced this money and the aliens, the numbers didn't come in. By midsummer the media campaign was getting ready to kick in and I had grave concerns that the QDEs were not going to be able to produce that which they had represented they could produce.

If indeed Monsignor de Marzio--just to use him as an example--had 1.2 million people in the pipeline, there was no advantage to me to pay millions of dollars on an alien campaign to see Monsignor de Marzio. He couldn't bring them in the office. Even if he had 3 million people, he couldn't get them in and I had a payroll to meet before the end of the fiscal year.

I decided I had to go to the alien population and tell them to come to the Immigration Service. I told the commissioner that we were going to fail if I didn't reach out to the alien public directly. He gave me the green light; and in the first advertisement campaign that went out, it went out late July of 1987 and it did not mention the QDE participation in the program at all.

We reached right out to the alien community and told them to see us. They started coming in in droves. By August, 1987, Monsignor de Marzio

came in and had a meeting with Mr. Norton and he told him I stole all of his clients. I found that a bit unusual because total receipts for the entire country at that time only amounted to 400,000 aliens by August of 1987. So if I stole all of this, I should have at least 1.2 million. That is, if they were represented by Catholic Conference. He said he was going out of business because I stole his clients and I guess he was right. He did go out of business. They only produced about a hundred thousand for the whole program.

Q. You stated INS provided start-up funds for QDEs. Did Congress require the INS to provide funds to QDEs?

A. I don't believe so, no.

THE COURT: Let me see, I don't want to drop this issue of pre-registration. Are you aware of any records that Catholic Conference or indeed any other QDE created and conceivably might be available in connection with this lawsuit that would demonstrate that persons came forward in the numbers claimed? Did the conference submit with its application for the 1.2 million any documentation as to the persons they had lined up?

THE WITNESS: I never saw the application, Your Honor, because it wasn't submitted to me. It was submitted to Mr. Duarte and I don't know the degree of specificity required to request the funds or if they just took them basically at their word. I never saw the application. I never saw the documentation supporting it. I do know that the request was made for $1.2 million and the service granted $800,000.

THE COURT: Largely on just as you understand it, the oral warranty or promise by this organization that it did indeed have at least 800,000 persons pre-registered implies that they had actually had contact with 800,000 aliens?

THE WITNESS: That is correct. From my own understanding of the situation was when we started out--I believe possibly improperly now--that when they were talking these types of numbers, they had a name and a contact, phone number or address that they had already interviewed somebody and they thought they had an applicant. It turns out that the quality of pre-registration was not quite that high. It might have been somebody saying, "By the way, is there going to be an amnesty program? If so, I might be interested."

"And how many kids do you have?"

"I have ten." They would chalk off ten pre-registered with no vehicle to ever contact again in the future. I think that is how it turned out. But they never were able to come up with names or anything else. This was an excuse used not just by The Catholic Conference. I don't mean to identify just them. They were the biggest one.

The other QDEs all represented to have people in the pipeline too. And when we would meet, we, the service, as I said earlier, my interests were in bringing enough people in the door especially in the first four months to pay back the money I borrowed. Their interest seemed to lie more in the area of advocacy. They weren't interested in production. They were interested in advocating certain issues.

And so we would meet and I would want to talk about where are the aliens? And they would want

to talk about issues. The end result was after jawboning for two or three months, I had to do it myself. I had to push them aside and reach out to the alien community.

THE COURT: You mentioned earlier that Congress had stipulated quite concretely in the statute a role for the QDEs. What in substance was that statutory role?

THE WITNESS: I don't remember the language of the statute right now, but as I understand it, they were to be an intermediary between the aliens and us. There was to be a role for them. I think Congress gave them a role because they wanted a role. They certainly didn't work for me. They weren't an arm of the Immigration Service.

THE COURT: What was the role?

THE WITNESS: Well--

THE COURT: What did you understand the role to be?

THE WITNESS: I understood the role was an end result of an argument put forth by them that the alien community was afraid to deal directly with the Immigration Service, that there had to be a middleman, someone whom the alien community could trust. That was them. They could receive the application from the alien. The alien would not be in contact with an official of the government. And then they could deliver the application to the government, and for that they would get a fee.

THE COURT: So the theory was that the QDE was to in effect collect the application, safeguard it, and forward it to protect that alien's rights?

THE WITNESS: That is correct.

THE COURT: Your view is as this program evolved that isn't principally what they did? They essentially got into policy debates?

THE WITNESS: It was not even essentially. It was from day one. It was advocating policy issues. They looked to the service, for example, through the regulatory process to substitute our judgment for that of the Congress. I can give you all kinds of examples.

THE COURT: That is sufficient.

Tr. 825-33.

Commissioner Slattery further testified:

Q. Were you ever informed that QDEs at any of these meetings that you participated in by representatives of QDEs and NCAs that their field offices were holding applications and not submitting them to the INS?

A. When I met with the QDEs, that seemed to be the message they were giving me at the meetings. And it was for a variety of reasons. In other words, if you would come up and say that ineligible family members can remain in the United States, we can get you applications if you will reduce the documentary requirements necessary to support an application. We get you applications.

So the implied threat was: Change your standards and we will get you the applications. They seemed to be motivated or driven by the fact that they almost wanted a guaranteed pre-approval before they gave you the application. They did not want to risk a denial. Even when the program started running and we were showing something like a 97 or 98 percent approval rate, they were still hesitant to

say they would submit an application until they were pretty much assured of a grant.

Q. Do you recall if the issue of public charge was raised as one of the reasons why the QDEs and NCAs were holding applications?

A. I don't remember, no.

Q. At any time during the meetings that you had with the representatives of the QDEs and NCAs, did you tell them that they should submit the applications that they were holding?

A. Absolutely.

Q. Why was that?

A. One I needed them. I needed a lot of applications. I wanted them to submit everything they had. I was satisfied in the integrity of the program that our goal was to look for a way to grant these cases as opposed to deny them. We intended to be very liberal in our adjudication. I think our end result establishes that position. We had a 90 something percent approval rate. We were just encouraging them and trying to show them that they were imagining more problems than what really existed in the program.

If they submit applications, they will see. We will approve them. Start submitting and we will grant them and they will get a feel as it goes out. They seem to want guarantees beforehand, before they would give us an application.

Tr. 838-40.

John O'Malley, an information officer for INS in New York during the legalization campaign, appeared on Channels 41 and 47 and on other television and radio programs as a spokesperson for the service in its outreach

efforts to the alien population in this area. Tr. 658-59. In the course of dealing with the public charge issue at such public or media forums, the witness stated that he would not have asserted that an alien whose United States citizen children were receiving welfare benefits did not qualify for legalization, because to have done so would have been inconsistent with the regulations that he was very familiar with and with the training he had received. Tr. 672-73. Nor did he ever say that waivers were not available for aliens who were found excludable on the basis of being determined likely to become a public charge. Tr. 674- 75. He stated that during the year he made 210 appearances on radio, television and at public meetings.

Richard Berryman, who served as INS's legalization officer for the amnesty program in Hempstead, Long Island during the application period, Tr. 695, conducted a two-week training session for INS personnel in April 1987 on legalization procedures in Burlington, Vermont. Tr. 700-02. He later became INS district coordinator for training. Tr. 704.

He described the process of interviewing an applicant as it might have implicated the public charge ground of exclusion:

> Q. Now, with respect to the interview process, would public charge exclusion grounds be one of the topics that was discussed or explored at that interview?
>
> A. Yes, if the person indicated that he had received public cash assistance, it was on the back page of the application. And if he indicated that, the adjudicator would explore that saying, "Did you receive public cash assistance?" Or "In what form was it?" For example, some people thought food stamps were public cash assistance and it was not. Many people thought that. Some

applicants thought that certain medical benefits that they had gotten constituted public cash assistance and it did not. So adjudicators would explore any grounds of inadmissibility that the alien checked off.

In the course of adjudicating the application, one of the eligibility criteria was financial responsibility. And the alien had to demonstrate that he or she was attached to the work force and did not receive public cash assistance, was able to support him or herself without recourse to public cash assistance. The supporting documentation was examined also to see that the alien had met that burden of proof. For example, if there were a year or certain amount of time after 1982 up until the time of the interview that the alien could not show that he or she was employed or getting income from somewhere, then the adjudicator would generally dwell on that and say, "There is a gap here. How did you support yourself during this period of time?"

We did not require documents for every single month of every single year. We were looking at a total picture of a person. Maybe he worked off the books. Not a proof of payment which was the case in a number of the applications that we saw, then the adjudicator was supposed to make a judgment. What is the totality of the picture here? Was this person able to support him or herself during this period of time?

Q. If an applicant indicated that they had in fact received public assistance over a fixed period of time during the relevant period, would that have automatically rendered them ineligible for legalization?

A. No, we were not allowed to disqualify anybody on that because it wasn't a grounds of statutory denial. If a person was inadmissible under one of the grounds of exclusion that could not be waived, then we would issue a local denial.

In the case you mentioned if it were public charge, we would indicate to the person the availability of a waiver and the necessity of applying for a waiver. And if it were granted, the application could be approved. Could be.

Q. Now, were these recommended denials or grants binding in any way upon the regional processing facility or the RPF?

A. No, the regional processing facility could overturn a local recommendation of grant or denial. So they were not binding in any manner or form, no. May I just expand on that? The regional processing facility was supposed to obtain the results of the fingerprint check that the alien applied for. The regional processing facility was also to get the results of a criminal background check and if there were another INS file in existence for an alien, the regional processing facility would get that other file and see if that file contained any information that had bearing on the legalization case.

We did not have the full picture on the local level. We made our recommendations based on what the alien had indicated on the application, what supporting documentation the alien had submitted, and on the judgment of the adjudicator in applying the applicable statute and regulations. But the RPF also had access to this other material and they would wait for any of that material and make a final decision.

Q. Mr. Berryman, I would like to go back for a second. I believe you indicated that in the case of a specific applicant who had received public cash assistance over a fixed period of time, that that would not result in an automatic finding of ineligibility. Would that have resulted in automatic recommendation for denial by the local office?

A. It would have. Yes, I have to explain that. If a person were inadmissible and a waiver were submitted or if the alien were told that a waiver were submitted, we would check or remedy a file and the adjudicator was told to articulate on the worksheet that the alien was informed that waiver was available, the waiver is attached, or as part of the application, or that the alien was informed that a waiver is available, was given form I-690 and told to mail it to the regional processing facility.

The reason to check denial was to flag down that application because at one stage, they were spot checking all recommended grants. But any recommendation denial was automatically flagged down for further RPF examination and final determination.

Q. Now, I would like for you to distinguish if you can between the circumstance you just described and one in which an alien applicant's United States citizen child received public cash assistance? Would under that second scenario, would that have resulted in automatic recommendation for denial by the local office?

A. No, I think in that instance, the adjudicator would explore how the alien met the burden of proof for financial responsibility. If there were a problem in that, during that time, the alien had to rely on public cash assistance to support himself

> and his or her family during the time, we would recommend a waiver at that time. This was before the special rule procedures were clarified.
>
> Q. And subsequent to the clarification of the special rule procedures, would there have been any other different result?
>
> A. Yes, if the adjudicator were convinced that the person fell under the provisions of the special rule, we would not require a waiver be submitted, and the adjudicator would so indicate on the worksheet--on the write-up on the worksheet--that the special rule applied. My judgment is that the special rule applies in this case. No waiver requested. Probably he would recommend a grant.

Tr. 710-15.

Mr. Berryman stated that at a training session involving one QDE in July of 1987, before the technical amendments of the regulations governing IRCA, he did, as reflected on page five of Pl.Ex. 54, state the following:

> In summary, 245A applicants for temporary residence who have received cash assistance because they were unable to support themselves and/or their families are subject to 212(a)(15). They may apply for a waiver if the waiver criteria apply: family unity, humanitarian considerations and in the public interest. Most of the QDE representatives present indicated that most of their clients who had received welfare did so due to entitlements to their U.S. citizen children. I indicated that these applicants should file a waiver because the family unity issue allowed for this and I saw no reason why such a waiver would not be viewed favorably by the Service.

Tr. 724. He indicated that subsequent to the technical amendments, however, his understanding changed: if the Special Rule applied, no waiver was needed. Tr. 725.

Mr. Berryman further testified that Pl.Ex. 54 was not disseminated to anyone outside INS, and that Pl.Exs. 31 and 60 were never disseminated to the QDEs by the INS. Tr. 727, 737-38. He confirmed that information relating to the public charge question as reflected in the INS training documents marked as Gov. Exs. F and G was in fact disseminated in QDE training sessions held in September 1987. Tr. 728-730. Finally, he stated that QDEs had no adjudicatory role in the process, but were merely to serve as a referral source, and that this was unequivocally communicated to them in the governing contracts (Pl.Ex. 38) and the training sessions. Tr. 735-37.

C. The QDE Witnesses

The plaintiffs presented the testimony of four QDE representatives: Marco Mason, Haydee Zambrana, Rachel Miller, and Heidi Schoedel. Plaintiffs produced these witnesses to establish that INS had broadly misled or at least confused the QDEs on the public charge issue as it related to AFDC payments to U.S. born children of IRCA applicants. We will not reference this testimony at length, as we found it generally not especially precise, even-handed or persuasive. What their testimony revealed is a striking unwillingness to deal with the language of the controlling regulations, a disposition to find only categorical certainty where qualification and condition obtain, and a reluctance to acknowledge the QDE role in the program as defined by statute, contract and instruction. One cannot, for example, read the testimony of Dr. Marco Mason, the director of the Caribbean Immigration Center, without concluding that his credibility is severely damaged by generalizations, equivocation and ignorance. Furthermore, his organization produced no

documentation to support his criticism of the INS procedures. Tr. 109-169.

Haydee Zambrana, who worked at the Concerned Citizens of Queens, testified that she could not recall if she had ever read the final IRCA implementing regulations, and she did not know if she ever read any regulations after May 4, 1987 or what portion she had read of the version that she did see. Tr. 215-16. With respect to her responsibilities toward the alien applicants whom fate placed in her care, she said that she "rejected" those whose applications raised questions as to the public charge issue. Tr. 218. She dealt with applicants who were employed but whose United States born children were receiving public cash assistance, and she "rejected" them, too. Tr. 219-20. She did not recall if she ever read the Special Rule provision but "assumed" that she had, and could not remember if she referred any questions about the public charge criteria to her organization's supervising attorney. Tr. 220-25. She could not recall reading the waiver provisions either. Tr. 226. She admitted that she was the official of her QDE who signed its agreement with the INS but could not remember if she advised "rejected" aliens of the availability of waivers, despite her organization's obligation under the agreement to do so when advising aliens who were likely to be rejected by the INS on public charge grounds. Tr. 231-32; Pl.Ex. 38 at ¶ 4.7. She also asserted that she could not recall seeing Section 245a(c)(3) of the Act, IRCA's prohibition of adjudication of amnesty claims by QDEs, but after reading it, agreed that it applied to QDEs. Tr. 228-29.

Rachel Miller testified that she worked at two QDEs during the amnesty program, the Chinatown Planning Council and the Traveler's Aid Service, and received training from the INS on the IRCA program. Tr. 332-36. She instructed her staff at the latter organization that the receipt of public cash assistance by an applicant

or his family was not a "good sign", and that it would require that an amnesty application be accompanied by a separate waiver application. Tr. 339-40. Traveler's Aid, however, never filed such a waiver request for an applicant whose citizen children were receiving public cash assistance, Tr. 342, and indeed, she was aware of only one applicant in this category, whose case was referred to outside counsel. She was unaware of any such cases coming into the organization on its hotline. Tr. 343.

Heidi Schoedel testified that during the amnesty program she was legalization director for the World Relief Corporation, certified by INS as a National Coordinating Agency. She conceded that whatever ambiguity World Relief found in the AFDC issue was dissipated in March 1988, at least two full months prior to the amnesty deadline, when she learned of the Slattery letter to John Payne. Tr. 602-04.

D. The Non-QDE Alien Advocates

The Non-QDE immigrant advocates called by the plaintiffs, Darlene Kalke, Julio Hernandez, Margaret McManus, Carmen Olmeda and Irene Leacock, gave a body of testimony that in substance establishes that the organizations represented had little or no direct contact with the INS, read the regulations with varying degrees of acuity and completeness, and gave advice to applicants on the public charge issue based largely upon a generalized understanding of that exclusion ground among those in the immigration advocate community. Reading this testimony, one is struck by the incoherence and disorganization that characterized the formal operations of these organizations. This is most strikingly true on the subject of the waiver, and the amazing indifference to the need for careful recordkeeping.

Darlene Kalke was executive director of the Center for Immigrant Rights during the legalization program. Most

unfortunately, this organization seemed to have been wholly oblivious to the potential damage that its pseudo-policies could do to the rights of individual alien applicants, especially because, under IRCA, there was no negative consequence (other than the loss of the filing fee[6]) that could befall an applicant whose amnesty petition was turned down. Ms. Kalke admitted that she held alien applications until the advocates "could change the regulations", and blamed this course upon a Legal Aid attorney remembered only as "Kathleen". Tr. 26-29.

Julio Hernandez of the Northern Manhattan Coalition for Human Rights asserted that he was told by Mr. Byrnes of INS in the fall of 1987 and the spring of 1988 that AFDC benefits to a citizen child of a parent then unemployed would disqualify the parent. Tr. 54. Mr. Byrnes testified that he had no recollection of such meetings. Tr. 643-44.

Margaret McManus, of the Volunteers of Legal Services, conceded that throughout the amnesty program, the regulations consistently provided for a "totality of the circumstances" test for determining an alien's proof of financial responsibility, that is, that he or she was not likely to become a public charge. Tr. 93-95; Pl.Exs. 9 and 25. She also conceded that neither of these Norton memoranda contained a *per se* public charge exclusion rule. Tr. 101-03.

Carmen Olmeda, a lawyer, worked at the Housing Workshop in the Bronx as a legal representative during the amnesty program. She testified about a potential applicant whom she discussed with a "dark-skinned" male with a foreign accent at the legalization office of INS. This

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6 Congress directed the Attorney General to provide for a schedule of fees to be charged for the filing of applications for amnesty. 8 U.S.C. § 1255a(c)(7)(A). The schedule of fees is codified at 8 C.F.R. § 103.7(b)(1) (Forms I-687 and I-690).

applicant had a continuous work history but was at the time unemployed for three months and had received two welfare checks on behalf of her citizen children. According to Ms. Olmeda, the "dark-skinned" male said that the applicant "was considered a public charge". Tr. 175-177. We can only observe that this kind of testimony, submitted by a lawyer who asserts that she was fully familiar with the full range of IRCA eligibility criteria and regulations, borders on the ludicrous. We are referred to no case file, no case analysis, no date, no identifiable official and no contemporaneous documentation. Obviously, this anecdotal proof, against which the Government cannot defend, is not especially probative and is entitled to very little, if any, weight.

Finally, Irene Leacock, the Executive Director of the Committee for Nicaragua Refugee Aid, testified that she was told by Ms. Zambrana, identified earlier, that alien parents whose citizen children were receiving welfare could not become legalized and that she was advising prospective applicants that they could not qualify for amnesty. Tr. 565-66. Ms. Leacock in turn trained others in her organization and some volunteers from Hostos Community College that illegal aliens with welfare dependent children could not be legalized. She said the same thing in media appearances. Tr. 572.

E. Local Welfare Official Witnesses

Plaintiffs also offered the testimony of three local welfare officials from the District of Columbia, New York and Texas. It is quite clear that these states, and presumably others, had strong policy disagreements with INS on the public charge issue. These states and the District of Columbia have large illegal alien populations who routinely received, before and after the passage of IRCA, local welfare support. Despite their broad and direct contact with these alien populations, the bureaucracies of these states apparently did little to

encourage these potential IRCA beneficiaries to go to INS and work out, on the ad hoc basis--considering the special circumstances, unique conditions, and personal history of each alien--contemplated by the statute and the regulations, the "likely to become a public charge" assessment. Rather, the states spent their energy, and the precious and limited time of the amnesty period, in petitioning INS for general and blanket assurances that welfare benefits available in a home with citizen children would, absolutely and categorically, be excluded from the "likelihood" assessment, even where the parent was unemployed or the AFDC benefits were being used by the parent. It is not surprising, given this dogmatic and, it must be said, simplistic approach, that all three local officials who testified conceded that the Special Rule and waiver provisions of the regulations played little or no role in their interaction with and advice given to the alien populations in their jurisdictions.

Ms. Gayle Smith of the District of Columbia, for example, did not give advice to her agency's staff on the waiver provisions, even though she had an understanding of those provisions, because her agency was concerned with not discussing the "intricacies" of the legalization process with prospective applicants. Tr. 243-44, 264-66. Indeed, Robert Sharkey, a New York official, testified that the State's Department of Social Services undertook to warn welfare applicants that receipt of AFDC benefits by themselves or by their children might jeopardize their legalization prospects, even though the agency was unsure of the effect of such benefit receipt and wanted a further explanation of those regulations. Tr. 296, 312, 330-31. It is clear that the New York agency resented the INS's reluctance to furnish advisory opinions about the impact on amnesty claims of specific welfare benefits. Tr. 306-10, 313. Diane Stewart, of the Texas Department of Human Services, ridiculed the INS's outreach efforts during the amnesty period, saying all that INS had done was to "put

notices on tamale packages and a few other things," Tr. 543, and yet neither she nor her agency recommended to any prospective legalization applicant to go and speak directly with INS because she did not want "to be trying to advise [welfare] recipients." Tr. 539.

IV. *Analysis*

A. Threshold Issues

In its letter of February 21, 1991, the Government has conceded, as it must, that the Court has subject matter jurisdiction over this case. *See McNary v. Haitian Refugee Center*, --- U.S. ----, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991).

The Government argues that the claims of the three original plaintiffs, Doe, Roe and Coe, who filed legalization applications prior to the expiration of the May 4, 1988 deadline, are either moot or non-justiciable because (1) they have been accorded temporary resident status, and (2) on July 12, 1989, the INS amended the IRCA regulations to provide explicitly that public cash assistance received by an alien's immediate family cannot be imputed to the alien for purposes of determining whether or not the alien is likely to become a public charge. These plaintiffs disagree, asserting that, at the time they apply for adjustment from temporary to permanent resident status, they "will again be subject to scrutiny under whatever public charge policy INS may have in effect at that time". Complt. PP 152, 157 and 162 (emphasis added). Although we are strongly inclined to agree with the Government that this claim is highly speculative and that in any case plaintiffs may be required to exhaust their remedies at the INS, we nonetheless decline to so rule in light of our disposition of the case.

The Government further asserts that the claims of the plaintiff- intervenors, Foe, Moe, Loe, Soe and Zoe, none of whom have filed legalization applications, are

premature and not yet ripe for adjudication. The same argument is made against the broad class they represent. This argument simply makes no sense in light of the nature of the injury complained of here, that is, that these aliens were prevented or dissuaded from filing for amnesty because of assertedly defective and unlawful regulatory and promotional procedures of the INS under the Act. Plaintiffs are entitled to seek redress from this Court by challenging the INS's regulations and procedures, without first having to file an application and be denied amnesty or having to wait for the INS to begin deportation proceedings. Cf. McNary, 111 S.Ct. at 898 (requiring aliens denied "Special Agricultural Worker" status to surrender themselves voluntarily in order to obtain judicial review is "tantamount to a complete denial of judicial review").

The last of the Government's threshold arguments is that the state and city plaintiffs lack standing to sue on behalf of their citizens because neither states nor local governments have parens patriae standing to sue the Federal Government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 & n. 16, 102 S.Ct. 3260, 3270 & n. 16, 73 L.Ed.2d 995 (1982); *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 86 S.Ct. 803, 816, 15 L.Ed.2d 769 (1966). The Government further argues that these plaintiffs do not have standing to sue by reason of any alleged injury to themselves, in that they have not shown any actual or threatened injury to New York State or New York City as a consequence of the alleged illegal conduct of INS. While the Government has a strong argument on both grounds, it is unnecessary to decide this issue because the non-governmental plaintiffs have standing. *See United States Department of Labor v. Triplett*, — U.S. —, 110 S.Ct. 1428, 1431, 108 L.Ed.2d 701 (1990); *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 3185, 92 L.Ed.2d 583 (1986).

B. The Merits

Our inquiry is threefold: (1) have the plaintiffs established that the INS's public charge regulations are inconsistent with IRCA; (2) have the plaintiffs established that the INS disseminated misinformation concerning its public charge regulations in violation of IRCA and the Due Process clause of the Constitution; and if so, (3) does the Court have the power to grant the relief sought.

1. Are INS's Public Charge regulations inconsistent with IRCA?

a. Standard of review

We begin with a classic restatement of the basic principle:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent to Congress.... If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [fn: The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.]

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (citations and one footnote omitted). "If Congress has explicitly left a gap for the agency to fill ... legislative regulations [promulgated pursuant to the statute] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44, 104 S.Ct. at 2782 (citations omitted). If the delegation of rule-making authority is implicit rather than explicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. (citations omitted).

Section 1255a(g)(1)(B) of IRCA directs the Attorney General to "prescribe ... such ... regulations as may be necessary to carry out this section." Additionally, Section 212(a) of the 1952 Act explicitly grants the Attorney General the authority to decide whether, and upon what grounds, an alien is likely to become a public charge. Thus, INS's interpretation of IRCA's "admissible as an immigrant" provision is entitled to a high degree of deference.

We do not think INS's "Special Rule" regulation is entitled to the same deference as the "public charge" regulation. Unlike the "public charge" provision, which clearly gives INS discretion in determining admissibility requirements, the Special Rule provision of IRCA may be read to reflect explicit Congressional intent with little room for flexibility in interpretation on the part of INS. The Rule provides that, "if the alien demonstrates a history of employment in the United States evidencing *self- support* without receipt of public cash assistance", he is eligible for adjustment of status. 8 U.S.C. § 1255a(d)(2)(B)(iii) (emphasis added). INS's "Special Rule" regulation, 8 C.F.R. § 245a.2(k)(4), however, incorporates INS's definition of "public cash assistance" as any "needs-based monetary

assistance ... received by the alien or *his or her family members*." 8 C.F.R. 245a.1(i) (emphasis added). Coupled with Congress's clear intent that IRCA be implemented in a liberal and generous fashion,[7] plaintiffs' contention that INS's "Special Rule" regulation is too restrictive is not insubstantial.

Moreover, as we have noted, INS has announced certain clarifications of its interpretation of IRCA's "public charge" and "Special Rule" provisions since its implementing regulations were first issued. "An agency's interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed.2d 80 (1981)). *See also Barnett v. Weinberger*, 818 F.2d 953, 960-61 & n. 74 (D.C.Cir.1987) ("prestige of a statutory construction" by agency depends crucially upon whether it was promulgated contemporaneously with enactment of statute and has been adhered to consistently over time); *Jordan v. Lyng*, 659 F.Supp. 1403, 1416 (E.D.Va.1987) (fact that agency's statutory interpretation has been neither consistent nor longstanding substantially

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7 Congress intended the legalization program to be "implement[ed] in a liberal and generous fashion." H.R.Rep. No. 682 (Part I), 99th Cong., 2d Sess. 72, *reprinted in* 1986 U.S.Code Cong. & Admin.News 5649, 5676 (hereinafter, "House Report"). Congress also "expect[ed] the INS to incorporate flexibility into the standards for legalization eligibility." House Report at 73. *See also* 130 Cong.Rec. H5908 (daily ed. June 15, 1984) (statement of Rep. Brown) (purpose of Special Rule for public charge determination was "to incorporate in the language of the bill a provision which demonstrates *more flexibility than we have historically had in connection with the application of the immigration law*") (emphasis added).

diminishes deference to which it is entitled in interpretation of statute); *Oregon Dep't of Human Resources v. Heckler*, 651 F.Supp. 6, 9 (D.C.Or.1984) (district court would not defer to agency's interpretation of statute where agency had interpreted statute inconsistently in the past).

b. The regulations

All that being said, the relevant regulations as a whole consistently provided that any legalization applicant whose U.S. citizen children received public cash assistance at any time on or after January 1, 1982 might be excludable from the legalization program as a public charge or likely to become a public charge, but that a determination of excludability had to be based on all of the alien's circumstances. The determination depended on such factors as whether the aid to the child was the alien's family's sole means of support and the length of time the alien's family had received assistance. *See* 8 C.F.R. § 245a.2(k)(4); Pl.Exs. 9, 18, 25 (identified *supra* at 11-12, 13, 15-16). If the assistance to the citizen child was entirely attributable to the alien parent, the alien could be excluded as likely to become a public charge. In such cases, the regulations provided for, *see* 8 C.F.R. § 245a.2(k)(2), and INS officials administering the legalization program encouraged, the liberal grant of waivers.

According to the plaintiffs, the "public charge" regulations *require* an applicant to demonstrate both a history of employment in the United States evidencing self-support and that none of *his or her family members* have received public cash assistance. We disagree. The "proof of financial responsibility" regulation provides that

> [a]n applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the

> applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 C.F.R. § 245a.2(d)(4). "Public cash assistance" is defined as assistance "received by the alien or his or her family members." 8 C.F.R.§ 245a.1(i). Read in isolation, this "proof of financial responsibility" may be interpreted as disqualifying any alien whose child has received welfare benefits.

Read in conjunction with the "Special Rule" regulation, however, the "public charge" regulations are not written in absolute terms; they do not *require* an applicant to demonstrate that his or her citizen children have never received public cash assistance. The "Special Rule" regulation, 8 C.F.R. § 245a.2(k)(4), is an explanation of factors, including the continuity of the alien's employment history and the length of time the alien has received public cash assistance, which were to be taken into account in determining whether an alien could be admitted despite the initial determination under 8 C.F.R. § 245a.2(d)(4) that the alien was inadmissible on the public charge ground. Thus, even before the November 1987 modifications of the public charge regulations, aliens with welfare dependent children did not *automatically* fall outside the Special Rule, the regulation implementing which stated only that "[p]ast acceptance of public cash assistance within a history of consistent employment" would be a factor in the analysis of INS, as would the duration of such assistance. 52 Fed.Reg. 16212 (May 1, 1987) (earlier version of 8 C.F.R. § 245a.2(k)(4)). While this regulation is poorly drafted, nowhere does it suggest that the receipt of public cash assistance, by the applicant himself, much less his immediate family, constituted a *per se* bar to an applicant's qualifying for amnesty under the Special Rule.

It is not surprising, then, that INS is on record as having said "the statute is clear regarding this subject and

applicants may in fact be ineligible for legalization *if [public cash assistance] was received by their U.S. citizen child.*" 52 Fed.Reg. 16207 (May 1, 1987). Although this formulation could have been clearer, and was indeed later clarified, we read it as implying that public cash assistance received in a formal sense by the child but used by the parent to support himself could be germane on the question of whether the applicant "evidenc[es] self-support without receipt of public cash assistance." This formulation comports with pre-IRCA applications of the "public charge" ground of exclusion. *See Matter of Perez*, 15 I. & N. Dec. 136, 137 (B.I.A.1974) ("the fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge").

There is no doubt that INS had the discretion to include aid received *indirectly by the applicant* through family members, such as AFDC funds, in the mix of factors and circumstances bearing upon an applicant's likelihood of becoming a public charge. First, when Congress enacted the public charge basis of exclusion into law, it declared:

> Since the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law, but rather to establish the specific qualification that the determination of whether an alien falls into that category rests within the discretion of the consular officers or the Commissioner [of Immigration].

S.Rep. No. 1515, 81st Cong., 2d Sess. 349 (1950) (quoted in *Matter of Harutunian*, 14 I. & N. Dec. 583, 588 (B.I.A.1974)). Thus, Congress has consistently recognized that bright-line, absolute rules are inappropriate in public charge determinations. Second, illegal aliens are ineligible for AFDC, SSI or New York State Home Relief benefits. *See* 42 U.S.C. ss 602(a)(33) and 1382c(a)(1)(B); N.Y.Soc.Serv. Law § 131-k; 45 C.F.R. § 233.50. Thus, illegal aliens generally receive public cash assistance only through their

U.S. citizen children, unless they are receiving benefits fraudulently.

Indeed, the very purpose of the AFDC program is to encourage the care of indigent dependent children in their own homes or in the homes of relatives by enabling states "to furnish financial assistance ... and other services ... to needy dependent children *and the parents or relatives with whom they are living.*" 42 U.S.C. § 601 (emphasis added). It was therefore entirely proper for INS to examine an alien's dependent family unit as a whole, rather than merely the alien's financial circumstances in a vacuum, and take into account those circumstances where an applicant was indirectly receiving welfare support through his or her children, in making the determination of whether or not the applicant was likely to become a public charge.

We find that the central INS documents in this lawsuit, the memoranda, dated September 23 and November 23, 1987 and April 21, 1988, issued by Associate Commissioner Richard E. Norton, Pl.Exs. 9, 14 & 25 (see supra at 1042 & 1043-1044), clarified the role in the public charge analysis played by AFDC benefits to U.S. citizen children, but did not change the basic and fundamental procedural rights conferred upon IRCA applicants by the regulations and the statute that authorized the promulgation of those regulations. Even if one is to read the April 21, 1988 memorandum as announcing a more liberal and accommodating policy of the INS on the AFDC issue, we note that two weeks remained before the expiration of the filing deadline for those in the plaintiff class to take advantage of whatever expansive reading one wishes to give to the final statement of Commissioner Norton on the subject.

By no later than November 17, 1987, the INS had broadly communicated to the alien population at large that the statute and the regulations authorized a legalization applicant three separate opportunities to address a "public

charge" ground of exclusion: a formal determination of whether a likelihood of becoming a public charge existed; application of the "Special Rule" to determine, notwithstanding an applicant's apparent excludability, whether the alien had demonstrated a history of self-support through employment; and the granting of waivers in suitable cases even though a public charge exclusion was warranted.

Accordingly, INS's regulatory framework, which defined "public cash assistance" as encompassing aid received by amnesty applicants either directly or indirectly through their family members, was a permissible exercise of the authority vested in the Attorney General and the INS by the controlling legislation. INS's consideration of citizen children's AFDC assistance in connection with an alien's IRCA application did not violate IRCA.[8] Thus, we find

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8 The fact that the Service amended its public charge regulations after the close of the filing period is of no import. In connection with the implementation of the second phase of the amnesty program, the adjustment of status from temporary to permanent resident, the definition of "public cash assistance" was modified to delete the phrase "or his or her immediate family." 54 Fed.Regs. 29442, 29443, 29448 (codified at 8 C.F.R. § 245a.1(i) (1990)). Similarly, the Special Rule regulation was amended to delete the phrases "and his or her family" from its first sentence and "and maintain his or her family" from its third sentence. 54 Fed.Regs. 29444, 29449 (1989) (codified at 8 C.F.R. § 245a.2(k)(4) (1990)). The Service explained at the time of the amendments that the modifications were done to make it clearer that the regulations were in line with its policies. 54 Fed.Reg. 29442 (1989). Moreover, because the public charge exclusion ground can be waived in the second phase of IRCA only for those individuals defined as aged, blind or disabled under the SSI program, see 54 Fed.Reg. 29453 (1989) (codified at 8 C.F.R. § 245a.3(g)(3)(ii) (1990)); 42 U.S.C. § 1382c(a)(1), the INS obviously thought it appropriate to eliminate any

that INS's public charge regulations were not arbitrary or capricious, and should be given proper legislative effect. *See Bowen v. Yuckert*, 482 U.S. 137, 145, 107 S.Ct. 2287, 2293, 96 L.Ed.2d 119 (1987); *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2782. We further find as a matter of fact and law that they are not inconsistent with or violative of IRCA nor facially unconstitutional.[9]

2. Has the INS disseminated misinformation concerning its public charge regulations, in violation of IRCA and the Due Process clause of the Constitution?

Having determined that INS's public charge regulations and policies were in all respects lawful, we turn to the issue of whether they were properly disseminated. Plaintiffs contend that confusion surrounding the "public charge" standard in the last few months of the program reflects the Government's failure to broadly disseminate eligibility requirements to undocumented aliens, in violation of IRCA and the Due Process clause.

IRCA emphasizes the need for broad dissemination of eligibility requirements. The legislative history of the legalization program reflects Congress's awareness that

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consideration of family members' aid at that second, and different, stage of legalization.

9 Plaintiffs contend that the distinction between childless aliens who earned just enough to support themselves and alien parents who earned just enough to support themselves but whose children were supported by public assistance violated the Equal Protection clause of the Fifth Amendment. *See* Plaintiff's Trial Memorandum of Law at 11-12. Given Congress's plenary authority over aliens and naturalization, U.S. Const. Art. I, § 8, cl. 4; *see Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), plaintiffs cannot seriously dispute Congress's power to deny admission to the U.S. based on the receipt, by an alien or her child, of public cash assistance.

undocumented aliens would have great difficulty in learning of and understanding the legalization program because of their isolation from mainstream society and their mistrust of the Government. See House Report at 73, 1986 U.S.Code Cong. & Admin.News 5677 ("legalization programs in other countries have usually produced a low rate of participation because of distrust of authority and *lack of understanding among the undocumented population* "). To ensure that the program would be effective, Congress mandated that information explaining the program's eligibility requirements be "broadly disseminated," 8 U.S.C. § 1255a(i), and contemplated an extensive education and outreach program. House Report at 73.

The Fifth Amendment of the Constitution commands the federal government: "No person shall ... be deprived of life, liberty, or property, without due process of law...." When a statute or rule creates a right or entitlement, that entitlement is "property" subject to the procedural protections of the Due Process clause. *Goss v. Lopez*, 419 U.S. 565, 572-73, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975). If due process attaches, a deprivation of property must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950). " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)). Determining what process is due requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally,

> the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. 424 U.S. at 335, 96 S.Ct. at 903. Thus, for example, whereas recipients of welfare benefits are entitled to an evidentiary hearing before the government may terminate their benefits, *Goldberg v. Kelly*, 397 U.S. 254, 266, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970), recipients of disability benefits, whose "need is likely to be less than that of a welfare recipient," are not entitled to pretermination hearings. *Mathews v. Eldridge*, 424 U.S. at 349, 96 S.Ct. at 909.

Although most cases dealing with benefits address the question of what process is due when benefits are terminated, at least one court has determined that due process requires adequate notice of newly-created welfare benefits. *In Grueschow v. Harris*, 492 F.Supp. 419 (D.S.D.), *aff'd on other grounds*, 633 F.2d 1264 (8th Cir.1980), the court pointed out that

> a newly-created benefit which fails to inform a large number of the potential recipients of their eligibility deprives those people of their rights to the benefits just as surely as if they had once obtained the money, only to have the state falsely claim that they were not eligible and that it must be returned.

Id. at 424. The court held that potential recipients of newly-created benefits must receive accurate, clear, and timely notice of the rules and standards for receiving such benefits. *Id.*

Relying on *Grueschow*, plaintiffs argue that they were entitled, under the Fifth Amendment, to clear, accurate and timely notice of INS's public charge regulations. *See also Perez-Funez v. District Director, INS*, 619 F.Supp. 656, 663 (C.D.Cal.1985) (due process rights

of unaccompanied minor aliens were violated where INS officials failed to advise aliens, before having them sign voluntary departure forms, of their right to a deportation hearing); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 376 (C.D.Cal 1982) (principles of due process and fundamental fairness required the INS to advise Salvadoran aliens of their right to apply for political asylum before requesting them to depart voluntarily). Furthermore, the Government may be required to make greater efforts at disseminating rules and standards when those affected by the rules are particularly inexperienced or incompetent. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799, 103 S.Ct. 2706, 2716, 77 L.Ed.2d 180 (1983).

Relying on *Olegario v. United States*, 629 F.2d 204 (2d Cir.1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981), the Government argues that plaintiffs do not have a legitimate claim of entitlement to citizenship under IRCA, and, consequently, that their legal claims are not subject to procedural due process analysis. Olegario involved a 1942 amendment to the Nationality Act of 1940. The amendment provided for the naturalization of non-citizens who served in the U.S. armed forces during World War II. The amendment exempted eligible persons from certain pre-existing statutory naturalization requirements, provided for their overseas naturalization, and *authorized* the INS commissioner, "with the *approval* of the Attorney General", *id.* at 208, to provide application forms and to "make such rules and regulations as were necessary to implement the Act." Pursuant to that authorization, a government official was stationed in the Philippines at the end of the war to naturalize eligible aliens. But in response to Filipino fears that the program would cause a mass exodus of Filipino men, the naturalization official was withdrawn from the country after only two months. No INS official was in the Philippines from October 1945 to July 1946. Technically

the program continued but, as a practical matter, Filipinos could no longer apply. A new official was stationed in the Philippines in August of 1946 but the entire 1940 Act expired four months later.

Because the Act did not grant eligible persons "a vested right to citizenship" but merely "liberalized the requirements and established a mechanism ... to enable soldiers overseas to apply for naturalization," 629 F.2d at 223, the Court of Appeals held that traditional due process analysis did not apply. The court went on to analyze the claim "simply as a statutory interpretation question inquiring whether the executive's actions clearly contravened a congressional mandate." *Id.* at 224. Because the decision to provide or withdraw the naturalization official was subject to the Attorney General's approval, the Court concluded that the Government acted within its discretion in withdrawing the naturalization official from the Philippines. *Id.* at 228.[10]

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[10] In *INS v. Pangilinan*, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988), discussed infra at 1065-1067, in which the Supreme Court reviewed a Ninth Circuit decision concerning the Filipino war veterans, the Court "assum[ed] that [the veterans] can properly invoke the protections of the United States Constitution, and grant[ed] that [the veterans] are members of a special class that Congress intended to favor with statutory entitlements to naturalization." *Id.* at 883-84, 108 S.Ct. at 2216. Nevertheless, the Court agreed with the Second Circuit's conclusion in *Olegario* that the war veterans had not been deprived of their rights under the Due Process clause of the Fifth Amendment. *Id.* at 884-85, 108 S.Ct. at 2216-17. The Court observed that, unlike non-citizen servicemen in other parts of the world, the Filipinos had the benefit of the presence of a naturalization officer in the Philippines from August 1945 to October of that year, and from August to December 1946. If INS was not obligated to station naturalization officials in other parts of the world at all, and nothing in the 1940 Act indicates that it was, then it was certainly not obligated to station an

IRCA is distinguishable from the 1940 Nationality Act because IRCA *requires* the INS to broadly disseminate eligibility standards and to grant legal status to eligible applicants. In contrast, the 1940 Act provided eligible Filipinos with, at best, an "opportunity" to become citizens, and left the decision to post a naturalization officer in the Philippines to the Government's discretion. Indeed, the Court in *Olegario* distinguished the 1940 Nationality Act from statutes that *mandate* benefits and thus create an interest protected by due process. *See, e.g., Board of Pardons v. Allen*, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987) (when parole statute mandates release, it creates a liberty interest subject to due process).

IRCA is such a statute that mandates benefits and creates an interest protected due process. IRCA provides that the INS "shall" grant legalized status to aliens who meet the eligibility criteria and "shall" broadly disseminate eligibility requirements. We conclude that Congress's use of the word "shall" in IRCA, making statutory actions mandatory, gives rise to statutory entitlements to amnesty which are subject to due process protection. *See Allen*, 482 U.S. at 376-77, 107 S.Ct. at 2419-20.

It is, however, not necessary to analyze and discuss, separately from IRCA's specific dissemination requirements, what process is due under the Fifth Amendment. The express statutory requirement in IRCA, that the INS "broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits," 8 U.S.C. § 1255a(i), is at least as broad as, if not more stringent than, the requirements of due process. Thus, if the INS's

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officer in the Philippines throughout the naturalization program. Thus, the Court rejected the argument that the withdrawal of the naturalization officer from the Philippines deprived respondents of their Due Process rights.

dissemination efforts pass muster under IRCA, they meet plaintiffs' due process concerns.

We find that the substance and scope of INS's outreach, education, and public awareness efforts broadly complied with its obligations under the Act and the Constitution to inform undocumented aliens of their rights under IRCA. The INS designed and carried out a comprehensive public awareness and media campaign specifically targeted at the alien population. Gov. Exs. A-C, E, K-L, N, P-T. It routinely advised QDEs of its policies and procedures, including the availability of waivers, to make the amnesty program succeed, Gov. Exs. G- I, M at 0100, and its cooperative agreements contractually bound the QDEs to disseminate waiver information to amnesty applicants, Pl.Exs. 37 at 6, 38 at 8.

We further find that INS did not instruct those attending its training sessions that aliens with citizen children on welfare were ipso facto barred from legalization. For example, Berryman's July 1987 memorandum, Pl.Ex. 54, which was prepared before the technical amendments to the regulations made it unambiguous that separate waiver applications were not required from those who could otherwise qualify under the Special Rule, indicated that there was "no reason" why INS would not act favorably on waiver applications filed by aliens with welfare dependent citizen children. *Id.* at 5.

In essence, plaintiffs argue that confusion in the alien population as to public charge regulations demonstrates that the INS failed to disseminate its public charge regulations. Plaintiffs allege that there was a widespread belief among aliens that the INS was applying a *per se* rule, excluding all aliens whose citizen children had received public assistance. We find that plaintiffs have failed to carry their burden of proof in this regard. Furthermore, the most persuasive evidence to rebut this allegation, that the INS was not broadly communicating its

message to the alien community that welfare receipt by an alien's child was not in practical and ultimate terms a bar to legalization, is INS's de facto adjudication of actual amnesty applications. A substantial representative sample of legalization applications filed in New York State effectively demonstrates that throughout the filing period the INS approved the great majority of applications not only of aliens with citizen children receiving public cash assistance, but also of aliens who were *themselves* on welfare. Gov. Exs. EE, FF. In most cases, the aliens themselves were not even required to file separate waiver applications.

This evidence contradicts the plaintiffs' principal argument that the alien population was confused and misled by the INS regulations on public charge policy. It demonstrates that aliens in the assertedly injured class were coming forward and being approved in spite of potential "public charge" problems. Indeed, this may explain why, although we were initially advised that the plaintiff class herein numbered in the thousands, so few class witnesses were presented at trial. Word of these approvals, passing rapidly through the family and associational connections of the alien population, galvanized it to go directly to the INS for the benefit, *see* Tr. 768 (testimony of Commissioner O'Reilly, quoted *supra* at 1048); Tr. 829 (testimony of Commissioner Slattery, quoted *supra* at 1050), debates on regulation nuances among the lawyers, advocates, and government bureaucrats notwithstanding.

We are further persuaded, upon careful consideration of the testimony of INS officials Byrnes, O'Malley, Berryman and O'Reilly, that there never was any *per se* rule with respect to receipt of public assistance by an applicant's children to the effect that it would automatically disqualify on public charge grounds an applicant without regard to the Special Rule or waiver;

that INS instruction and training of its own personnel and QDE personnel was consistent with that policy; and that the public position of INS personnel on the public charge question did not misrepresent that policy.

The testimony to the contrary by alien witnesses was generalized, amorphous, and remarkably redundant on the crucial point, with little reference to or memory of context in which the alleged misleading radio and television statements were made. There was, we are sad to observe, something of a drill in their cadenced invocation of the decisive words.

We decline to give any significant weight to the testimony of Irene Leacock, who asserted that, in a legalization conference conducted by her organization, the Nicaraguan Committee, in the spring of 1988, Mr. O'Malley or his colleague stated categorically that legalization could not be obtained by parents whose children had or were receiving public assistance. We further find that any confusion that may have attended Mr. Berryman's expressions on the matter were de minimis, and in any case ceased when the Special Rule regulation was amended.

In sum, we find that the administration and implementation by the INS of the amnesty program, as it related to the public charge ground of exclusion, complied in all respects with the requirements of the Act and did not contravene the Due Process requirements of the Constitution.

3. Does the Court have the power to grant the relief sought?

Even if the plaintiffs had prevailed on the merits, we do not believe, based upon this record, that the Court has the authority to compel INS to accept applications after the May 4, 1988 expiration of the amnesty period. The appropriate starting point in addressing this issue is

INS v. Pangilinan, 486 U.S. 875, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988).

Pangilinan is in all likelihood the last chapter in the Filipino war veteran cases. The respondents were sixteen Filipino nationals who served with the U.S. armed forces during World War II. Fourteen of the respondents were in the Philippines before the 1946 cutoff date but took no action toward being naturalized. One of the respondents made inquiries at the American embassy in July 1946 but was told that there was no one there who could assist him. Decades later each of the respondents filed petitions for naturalization in federal court in California based on the 1940 Act, which had expired in 1946. The district court denied the petitions but the Ninth Circuit reversed, holding that the withdrawal of the naturalization officer from the Philippines violated what it called the mandatory language of the 1940 Act and that naturalization of the respondents was an appropriate equitable remedy. *Pangilinan v. INS*, 796 F.2d 1091 (9th Cir. 1986).[11]

In reversing the Ninth Circuit, the Supreme Court first observed that the Constitution grants Congress the express authority to establish rules of naturalization. *Pangilinan*, 108 S.Ct. at 2215. The legislation at issue in *Pangilinan* established a *fixed, immutable* cutoff date of December 31, 1946 for the filing of naturalization petitions. Furthermore, Congress adopted a new citizenship program in 1948 which excluded Filipino servicemen and specifically provided that *timely* applications under the 1940 Act which were still pending would be reviewed under the 1948 provisions. Finally, in 1961, Congress amended the 1952 Nationality Act, specifying that any petition thereafter filed would be reviewed under the 1952

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11 The Court ordered that respondents be naturalized, not simply that they be given an opportunity to petition for naturalization.

Act. *Id.* Thus, the respondents were confronted with an expired deadline in the Act under which they sought benefits, as well as the mandate of two subsequent pieces of legislation. Accordingly, the Court concluded that "respondents have no statutory right to citizenship." *Id.*

Pangilinan was the third Ninth Circuit decision on the Filipino war veteran program that came before the Court. The Court noted that in the first such case, *INS v. Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973) (per curiam), it concluded that the challenged actions of INS did not give rise to an estoppel against the government because INS " 'in enforcing the cutoff date established by Congress ... [was] enforcing the public policy established by Congress.' " *Pangilinan*, 108 S.Ct. at 2215 (quoting *Hibi*, 414 U.S. at 8, 94 S.Ct. at 21).[12] Although the Ninth Circuit recast its theory in Pangilinan, "not that estoppel eliminates the effectiveness of the December 31, 1946, cutoff, but that equitable authority to craft a remedy enables the conferral of citizenship despite the cutoff", 108 S.Ct. at 2215, the Supreme Court's conclusion was the same: such theories cannot override a public policy established by Congress. *Id.*

The Court emphasized that district courts do not have equitable power to confer citizenship. " 'An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress.' " *Pangilinan*, 108 S.Ct. at 2216 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474, 37

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[12] Though not mentioned in *Pangilinan*, the Court in *Hibi* also concluded that INS's failure to fully publicize the rights accorded under the 1940 Act or its failure to station a naturalization officer in the Philippines during the full period those rights were available did not amount to the kind of "affirmative misconduct" necessary to invoke estoppel against the government. *Hibi*, 414 U.S. at 8-9, 94 S.Ct. at 21-22.

S.Ct. 422, 425, 61 L.Ed. 853 (1917)). " 'Once it has been determined that a person does not qualify for citizenship ... the district court has no discretion to ignore the defect and grant citizenship.' " *Id.* (quoting *Fedorenko v. United States*, 449 U.S. 490, 517, 101 S.Ct. 737, 752-53, 66 L.Ed.2d 686 (1981)). Thus, "[n]either by application of the doctrine of estoppel, nor by equitable powers, nor by any other means does a court have the power to confer citizenship in violation of these limitations." *Id.*

Relying in part on *League of United Latin American Citizens v. INS*, No. 87- 4757-WDK (C.D.Cal. August 12, 1988) (*LULAC*), in which the court ordered the INS to receive amnesty applications for an additional six-month period,[13] plaintiffs argue that *Pangilinan* is distinguishable from this action because (1) INS was violating, rather than enforcing, the public policy established by Congress, (2) IRCA merely creates a twelve-month period of amnesty, rather than an immutable cut-off date, and (3) plaintiffs here seek merely to file applications, rather than be granted citizenship. *See LULAC*, slip op. at 7-8. Plaintiffs therefore assert that the Court is not precluded by *Pangilinan* from compelling the INS to accept IRCA applications after the May 4, 1988 deadline.

We disagree. The Congress, as we have noted, explicitly established May 8, 1988 as the cut-off date for filing applications for amnesty, and reaffirmed that determination in April 1988, by refusing to extend the

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13 The court found that the INS, in dissuading the plaintiffs from applying for amnesty during at least part of the twelve-month period, in effect deprived the plaintiffs of the full twelve-month statutorily mandated application period. Slip op. at 6. Accordingly, the *LULAC* court determined that it had the power to order INS to accept applications for an additional six-month period, to compensate the plaintiffs for the application time they lost because of INS's actions. *Id.* at 9.

deadline. 134 Cong.Rec. S5041-43 (daily ed. April 28, 1988). In refusing to accept applications beyond that deadline, INS is enforcing the public policy established by Congress. Because no application filed after the May 8, 1988 deadline is "timely filed", an essential qualification for amnesty under IRCA, aliens who did not file applications before May 8, 1988 are statutorily ineligible for amnesty. Under the analysis of *Pangilinan*, we may not compel INS to accept applications for amnesty after May 8, 1988.

Even if *Pangilinan* were not controlling, we do not believe that we could or would exercise our equitable powers in favor of the plaintiffs because there has been no showing of affirmative misconduct by the Government in its administration of the legalization program under IRCA.

In determining whether or not equitable tolling[14] of the filing deadline is appropriate, we must consider whether equitable tolling is consistent with congressional intent and called for by the facts of the case. *Bowen v. City of New York*, 476 U.S. 467, 479-80, 106 S.Ct. 2022, 2029-30, 90 L.Ed.2d 462 (1986). In *City of New York*, the Court noted that the statute in question, involving disability benefits, was designed to be unusually protective of claimants rights and also permitted the agency to toll the 60 day statutory period for appeal in individual cases for a variety of equitable reasons. The Court also observed that plaintiffs only discovered the full extent of the agency's wrongful conduct after expiration of 60 day appeal period. Id. at 480, 106 S.Ct. at 2030. In addition, although the Court did not expressly mention "affirmative misconduct" as a prerequisite to equitable tolling, the

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[14] Although the twelve-month filing period does not establish a statute of limitations within which to bring a court action, we analogize equitable tolling of a statute to equitable extension of the filing deadline.

conduct at issue was so characterized. The Court quoted with approval the circuit court's description of the government's conduct as secretive, and the Court implied that the agency was not faithfully executing its duties. *Id.* at 480-81, 106 S.Ct. at 2030.

Moreover, the Court was applying "traditional equitable tolling principles," *id.* at 479, 106 S.Ct. at 2029 (citing *Honda v. Clark*, 386 U.S. 484, 501, 87 S.Ct. 1188, 1197, 18 L.Ed.2d 244 (1967)), under which affirmative misconduct is required. *See LULAC*, slip op. at 4-5. Thus, equitable tolling in cases involving the exercise of administrative power has largely been limited by the Supreme Court to those situations where the record shows that the Government engaged in clandestine or otherwise misleading conduct that deprives a claimant of the opportunity to exercise his or her rights. *Bowen v. City of New York*, 476 U.S. at 480-81, 106 S.Ct. at 2030 (1986); *see also New York v. Sullivan*, 906 F.2d 910, 917 (2d Cir.1990) (tolling appropriate where "government misconduct" kept plaintiffs from appreciating scope of rights); *Wong v. Bowen*, 854 F.2d 630, 631 (2d Cir.1988) (equitable tolling appropriate only where government has hindered claimant's attempts to exercise her rights by acting in a misleading or clandestine way).

Here, equitable tolling is not consistent with congressional intent nor called for by the facts of the case. As we have noted, Congress has strongly opposed extension of the deadline. In addition, the record demonstrates not a hidden and narrowing definition and application of criteria, but a public and liberalizing clarification of the relevant criteria. The regulations could undoubtedly have been more clearly drafted and more broadly disseminated, but the Government's shortcomings as evidenced by this record do not rise to the level of affirmative misconduct required to equitably toll the limitations period.

Nor should the INS be equitably estopped from refusing to accept applications past the deadline. Again, even assuming that the clarifying memoranda could and should have been more broadly disseminated, a claim certainly not established by plaintiffs, an agency's failure to fully publicize rights created by Congress cannot give rise to an estoppel against the government. *Lyng v. Payne*, 476 U.S. 926, 935-36, 106 S.Ct. 2333, 2339-40, 90 L.Ed.2d 921 (1986); *INS v. Hibi*, 414 U.S. 5, 8-9, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973).

With respect to the QDEs, we conclude that any irregularities involving them established in the record are not attributable to the Government because they were not caused, condoned, or approved by the INS. First, we find that the plaintiffs have not carried their burden of showing that the QDEs were agents of the INS and not mere independent contractors. Accordingly, we expressly decline to adhere to our previous, uninformed characterization of the QDEs as "quasi-governmental agencies under IRCA," Order dated April 26, 1988, and now find that the QDEs were not in fact agents of the INS. Even if the QDEs were agents of the INS, the Government cannot be bound by QDEs' actions that were outside the scope of their authority. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947); *Doe v. Civiletti*, 635 F.2d 88, 96 (2d Cir.1980). In violation of both Section 245a(c)(3) of IRCA and the Agreements they entered into with INS, QDEs admittedly failed to inform applicants of the availability of waivers, pre- adjudicated applications for amnesty, and withheld them from the INS.

The only question remaining, then, is whether any of the alien plaintiffs have established that they constructively filed applications for amnesty *prior* to the expiration of the amnesty period on May 4, 1988. In spite of our repeated emphasis upon this theory of relief, both in

previous proceedings and during the trial, *see* Order dated April 26, 1988 at 3; Tr. 622, 624, plaintiffs have not attempted seriously and energetically to establish that any individual members of the class took steps in pursuing amnesty prior to the deadline that would be sufficient to constitute a constructive filing.

To establish a constructive filing, the plaintiffs must demonstrate that class members took some affirmative steps to attempt to file properly a timely legalization application. *See, e.g., In re Thornburgh*, 869 F.2d 1503, 1516 (D.C.Cir.1989) ("The constructive filing argument ... entails a showing that the aliens in question complied with the statute by attempting to file [legalization] applications in a proper and timely fashion"); *In re Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931, 940 (N.D.Cal.1975) (naturalization petitioner who had timely filed appropriate form commencing naturalization proceedings took the only affirmative step a prospective petitioner could take under the INS's regulations and had, therefore, constructively filed such petition).

Here the testimony of all but one of the alien witnesses established that, having received erroneous information regarding their eligibility, they made no effort to substantiate that information with either the INS or a QDE, let alone file a timely application. Additionally, the one witness who did have contact with a QDE did not personally discuss her eligibility with anyone from that organization.

For example, Maria P. testified that she consulted Julio Hernandez after she had heard that a child's receipt of public assistance would disqualify a parent from legalization eligibility. Tr. 407, 411. Mr. Hernandez, however, was neither a Government official nor an employee of a QDE. Tr. 416. Similarly, Miriam B. testified that she consulted with a private attorney and two unidentified Catholic immigrants' rights organizations

concerning her legalization eligibility. Tr. 479-83. There was no evidence offered to establish that either organization was a QDE. Tr. 490. Additionally, even though Ms. B. was informed that the public charge ground could be waived, Tr. 483, she did not apply for amnesty because she was told by the immigrants' rights representative that her chances of being approved were "next to nothing." Tr. 483.

Moreover, three of the class members, Jenny C., Sonia R. and Rosa C., made absolutely no effort to inquire as to their legalization eligibility after they heard that receipt of public assistance by themselves or by their children disqualified them from the program. Jenny C. claimed that she met a friend in May 1987 who told her that she was ineligible and showed her a document, relating to a different phase of the program, which stated that receipt of "certain kinds of public assistance" disqualified temporary resident aliens from adjusting their status to that of a permanent resident. Tr. 426-28; Pl.Ex. 30. Ms. C., who still had approximately one full year to clarify her legalization eligibility status, made no further inquiries. Tr. 435.

Similarly, Sonia R. admitted that her children did not even begin to receive public assistance until July or August 1987, after she had heard that receipt of such benefits would make her ineligible for legalization. Tr. 447-49; 451- 52. Yet, she also made no further effort to clarify her amnesty prospects. Although she indisputably had about a three-month window of opportunity within which to file, she did not do so at the behest of her father-in-law and because she wanted "to wait a while" after her recent marriage. Tr. 451-55.

Rosa C., who claimed that she first believed herself to be ineligible for legalization "some months" after the start of the program, Tr. 460-61; 462-63, also failed to confirm that information with either a QDE or the INS.

Finally, while plaintiff-intervenor Linda Loe testified that her mother attempted to clarify Ms. Loe's eligibility with a QDE, Concerned Citizens, Ms. Loe did not personally discuss her prospects with anyone at that organization. Tr. 395.

In similar cases, courts have found a constructive filing only if the applicant has taken all affirmative steps to comply with the relevant statute before the expiration of the statutory period. For example, in *In re Petition of Vacontios*, 155 F.Supp. 427 (S.D.N.Y.1957), this Court, deeming a naturalization petition timely filed even though it had been submitted beyond the statutory one-year deadline, explained:

> When one takes *all necessary affirmative* steps to comply with the literal requirements of a statute and is prevented from complying fully by the failure of an administrative agency to take the steps necessary to permit his compliance he will not be barred from asserting his rights under the statute.

Id. at 433 (emphasis added) (citations omitted). Relying on *Vacontios*, the Northern District of California in *68 Filipino War Veterans* held that naturalization petitioners who had taken the " 'only affirmative step a prospective petitioner could take under the Service regulations,' " had constructively filed their naturalization petitions. 406 F.Supp. at 940 (citations omitted).

More recently, the District of Columbia Circuit rejected the Government's argument that prospective IRCA applicants were foreclosed from establishing that they had constructively filed their applications. The court explained, however, that this was because:

> it is entirely possible that some members of the class in this case could show that they took affirmative steps to file before May 4, 1988, thus, warranting a finding of constructive filing. If, for

> example, a[n] ... alien went to an INS office and was turned away on the basis of 8 C.F.R. § 245a.1(d), the alien's action might have been "the only affirmative step a prospective petitioner could take".... Consequently, that action might be considered "the constructive equivalent of filing a petition" for amnesty.

In re Thornburgh, 869 F.2d at 1516 (citations omitted).

In sharp contrast to the foregoing, the effort expended by these witnesses during the filing period simply does not rise to a level sufficient to find that they had constructively filed their applications. At most, some of the witnesses claimed that they took some steps to inquire about their eligibility from non-governmental sources. None of these witnesses, however, took any affirmative, conscientious step to actually file an application. Indeed, none of these witnesses contacted the INS to inquire about filing during the amnesty period. Nor has any person come forth during this entire case and alleged that he or she was turned away at an INS legalization office because he or she had a welfare-dependent child. In short, the alien witnesses in this case have utterly failed to establish that they took "all necessary affirmative steps" to perfect their claims. We therefore find that the plaintiffs and class members did not constructively file timely amnesty claims.

Accordingly, the Clerk of the Court is directed to enter judgment in favor of the Government, and the complaint is dismissed.

SO ORDERED.

Dated: New York, New York
April 18,1991

KENNETH CONBOY, U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 88 Civ. 2265 (KC)

CESAR PERALES, ET. AL., PLAINTIFFS,

AND

LINDA LOE, SUSAN SOE, MARY MOE, FRAN FOE, AND ZELDA ZOE, INDIVIDUALLY, ON BEHALF OF THEIR MINOR CHILDREN, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFF-INTERVENORS,

v.

EDWIN MEESE, III, ET AL., DEFENDANTS.

MEMORANDUM AND ORDER

Kenneth Conboy, District Judge:

I. *Class Certification*

Plaintiffs seek certification of a class composed of:

> [a]ll undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R. §§ 245a.1 (i), 245a.2(d) (4) and 245a.2(k) (4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not limited to those individuals who were deterred from filing

> applications for legalization under the Legalization program.

(complaint ¶ 15 at 8-9). Most of the factors asserted by plaintiffs in support of class certification are not challenged by defendants and need only be discussed briefly.

23(a)

NUMEROSITY

Plaintiffs' reasonable estimates about the size of the class, as well as the class's relative isolation and dispersement, indicate that joinder is impractical.

COMMONALTY

There is at least one question of law common to all proposed class members. That is whether, as undocumented aliens whose family members receive public cash assistance, they were subject to unduly restrictive eligibility regulations. Furthermore, each class member was confronted with the same allegedly deficient dissemination efforts on the part of the Immigration and Naturalization Service ("INS").

TYPICALITY

Defendants' most significant objections are (or should be) directed at the atypicality of the proposed class representatives. They argue that each proposed class member's right to relief will depend on unique facts, the most important of which is the class member's subjective state of mind. In addition to potential differences in the effect of the government's actions or inactions on each class member's state of mind, there will likely be differences between the exact information each class member received; the source of such information (e.g. from the regulations themselves, from government officials, or from third parties); if received from a third party, whether the information was misstated; and the extent of the class member's efforts to obtain accurate information. While the

existence and extent of an individual class member's reliance on erroneously or inadequately disseminated information, as well as the extent of the class member's efforts to obtain accurate information, may affect his or her right to relief, it does not mean that class certification is inappropriate. Where, as here, the proposed representatives' claims arise from the same course of conduct and are based on the same legal theories, unique defenses or individual fact differences do not render the proposed representatives' claims atypical. 1 H. Newberg, *On Class Actions*, §§ 3.13 to 3.16 (2d ed. 1985); *see also In re Am International, Inc. Securities Litigation*, 108 F.R.D. 190, 194 (S.D.N.Y. 1985) (fact that individualized questions of reliance in securities fraud action may exist is not sufficient to defeat class certification). If necessary, separate trials can be held on issues that require individualized treatment.

ADEQUACY OF REPRESENTATION

Plaintiffs are represented by experienced and resourceful counsel and the plaintiffs have no apparent conflicts with other potential class members. Accordingly, the Court finds that the named plaintiffs will adequately represent the class.

23(b)

Certification is clearly appropriate under 23(b) (2). Plaintiffs seek declaratory and injunctive relief arising out of the government's actions and inactions in its promulgation and dissemination of eligibility standards under IRCA. In effect, this lawsuit involves allegations that the government has acted or refused to act on grounds generally applicable to the proposed class. Accordingly, class certification is granted.[1]

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1 Defendants also contend that the governmental plaintiffs lack *parens partriae* standing to maintain this action. Because at least one of the individual plaintiffs has standing, it is unnecessary to consider this issue. *See Village of*

II. *SUMMARY JUDGMENT*

Plaintiffs move for partial summary judgment, seeking a ruling that 1) defendants' "public charge" regulations facially violate IRCA and the Equal Protection component of the Fifth Amendment 2) defendants' failure to disseminate accurate eligibility standards to the public and their issuance of regulations that were at best ambiguous and misleading violate IRCA and the Fifth Amendment, and 3) that equitable tolling of the May 4 deadline (or similar relief) will be available to those class members who can demonstrate that they were deterred from applying for legalization by defendants' illegal policies. The defendants oppose the motion in all respects and cross-move for summary judgment, seeking a ruling that a) the public charge regulations are legal and were properly and clearly disseminated, and b) the Court has no power to grant the type of relief sought, regardless of the merits of the claims, in light of the expiration of the amnesty period on May 4, 1988. The Court will deal with this last contention first.

In arguing that the Court has no power to extend the application period, regardless of the merits of plaintiffs' attack on the INS's administration of the legalization program, defendants rely principally on *INS v. Pangilinan*, 108 S. Ct. 2210 (1988). Although the parameters of the Court's power to grant the type of relief sought here is by no means clear, I do not accept the broad reading of *Pangilinan* asserted by defendants. In this regard, the Court concurs with the reasoning of *League of United Latin American Citizens v. INS*, No. 87 Civ. 4457 slip op. (C.D. Cal., Aug. 12, 1988). I would add only a few brief points. Contrary to defendants' assertion the *Pangilinan* Court must have concurred in the Ninth Circuit's finding that the statute at issue there had been violated, the clear import of the opinion was that the

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Arlington heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 n.9 (1977).

challenged actions were at all times consistent with congressional intent. Not only was there no specific statutory mandate to maintain a naturalization officer in the Philippines during the relevant period, but, as the Court observed, non citizen Filipino servicemen fared better on balance in the implementation of the 1942 amendments to the Nationality Act than non citizen servicemen from other parts of the world. Here, in contrast, it is alleged that the INS violated specific congressional mandates by promulgating unduly restrictive regulations and inadequately and/or misleadingly disseminating information about the same. It is also significant that *Pangilinan* separately discussed two constitutional attacks on the implementation of the 1942 amendments after ruling that the courts had no power to confer citizenship in violation of clear congressional policy. If the Court were positing a per se rule that the expiration of an application cut-off date absolutely precludes judicial remedies, regardless of the theory supporting relief, it would have been simpler and more logical to avoid any discussion of the merits of the plaintiffs' claims. Finally, as the Court reasoned, it would have been absurd to conclude that consideration of applications under the 1942 amendments, filed 30 years after the deadline, would be consistent with congressional intent when Congress enacted subsequent legislation that effectively led to the denial of citizenship to Filipinos who filed *timely* applications under those amendments.

As to the remaining issues, the Court declines to grant summary judgment for either side. Although the complexity and importance of a case is not in all instances an obstacle to summary adjudication, I find that the circumstances here favor forbearance until a full record is developed on all material issues. *Cf. Kennedy v. Silas Mason co.*, 334 U.S. 249 (1948); *McWhirter Distributing, Co. v. Texaco, Inc.*, 668 F.2d 511 (1981); *Elliot v. Elliot*, 49 F.R.D. 283 (S.D.N.Y. 1970).

III. *INTERVENTION*

The motion for intervention is granted.

SO ORDERED

Dated: New York, New York
March 29, 1989

Kenneth Conboy, U.S.D.J.

APPENDIX G

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 1307, Docket 88-6115

CESAR PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ROBERT ABRAMS, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK AND SARA DOE, JANE ROE, AND ANNE COE, INDIVIDUALLY, ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND THEIR MINOR CHILDREN, PLAINTIFFS-APPELLANTS,

v.

EDWIN MEESE, III, AS ATTORNEY GENERAL OF THE UNITED STATES, WILLIAM S. SLATTERY, AS ASSISTANT COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, EDWARD WILDBLOOD, AS LEGALIZATION DIRECTOR OF THE INS EASTERN REGIONAL OFFICE, GILBERT TABOR, AS INS EASTERN REGIONAL PROCESSING FACILITY DIRECTOR, CHARLES SAVA, AS INS DISTRICT DIRECTOR OF THE NEW YORK DISTRICT, AND OTIS R. BOWEN, AS SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES.

Appeal from an order entered in the United States District Court for the Southern District of New York, Conboy, J.

Before LUMBARD, MESKILL and WINTER, Circuit Judges.

PER CURIAM:

This is an appeal from an order entered in the United States District Court for the Southern District of New York, Conboy, J., denying plaintiffs- appellants' motion for a preliminary injunction. The plaintiffs-appellants are the State of New York, the City of New York, the Commissioner of the New York State Department of Social Services, the Attorney General of the State of New York, and three anonymous undocumented aliens who are seeking to apply for the status of lawful residents under the terms of the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (1986). IRCA established a program under which undocumented aliens who had resided in this country for a requisite time period, and who were otherwise qualified for admission as immigrants, could seek lawful resident status. See 8 U.S.C. § 1255a (Supp. IV 1986). Applicants seeking the benefit of that so-called amnesty or "legalization" program were required to do so no later than May 4, 1988. See 8 U.S.C. § 1255a(a)(1)(A); 8 C.F.R. § 245a.2(a)(1) (1988).

Congress recently considered extending the May 4 deadline but failed to do so. See 134 Cong.Rec. S 5041-43 (daily ed. Apr. 28, 1988).

The appellants in this case argue that the deadline should now be extended for a class of undocumented aliens who were unfairly affected by certain regulations promulgated by the Immigration and Naturalization Service (INS) pursuant to IRCA. In sum, appellants argue that INS regulations precluded undocumented aliens with citizen children who receive public assistance from seeking legalization under the statute, see 8 C.F.R. §§ 245a.2(d)(4), 245a.1(i); see also 52 Fed.Reg. 16,207 (May 1, 1987), when Congress intended that eligibility under the statute should

hinge solely on an individual applicant's ability to be *self-supporting*, see 8 U.S.C. § 1255a(d)(2)(B)(iii). They argue that the effect of the regulations, and the INS' allegedly inconsistent policies, was to deter qualified applicants from seeking the benefits of the program until it was too late to take advantage of them. The individual plaintiffs seek to represent a class of all similarly situated potential applicants in New York State. The state and municipalplaintiffs challenge the regulations in their own capacity and seek to represent the class of potential applicants in a *parens patriae* capacity.

After bringing this action in the district court, but before obtaining certification of a class, appellants sought a preliminary injunction imposing, *inter alia*, a renewable sixty-day extension of the May 4 deadline while the INS and the United States Attorney General promulgated and publicized new regulations and policies more consistent with the terms and intent of IRCA. The district court denied the motion. The denial is hereby affirmed, substantially for the reasons stated in Judge Conboy's Memorandum Opinion and Order dated April 19, 1988, 685 F.Supp. 52 (S.D.N.Y.1988).

APPENDIX H
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 88-8035

CESAR PERALES, AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL., PLAINTIFFS-APPELLANTS,

v.

EDWIN MEESE, III, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of May, one thousand nine hundred and eighty-eight.

Upon consideration of plaintiffs-appellants' ("plaintiffs") application for an injunction pending the appeal of an April 26, 1988 order of the United States District Court of the Southern District of New York, Kenneth Conboy, Judge, denying plaintiffs' motion for a preliminary injunction, it is hereby

ORDERED, that pending the argument of this appeal, defendants-appellees ("defendants") shall continue to permit the filing by members of the proposed plaintiff class of applications for temporary resident status pursuant to 8 U.S.C. § 1255a, on the same basis as has been in effect during the May 5, 1987 through May 4, 1988 application period. Plaintiff class members who file applications otherwise in conformity with the applicable procedures with the Immigration and Naturalization Service ("INS") pursuant to the terms of this order shall be granted provisional work authorization which will be valid only for so long as this Order remains in effect, and shall be protected from any deportation proceedings to the extent set forth in 8 U.S.C. §

1255a(e)(2) only during the period while this order is effective. Solely for purposes of this Order, the proposed plaintiff class is defined as "all undocumented aliens residing in New York State on or before May 4, 1988 who assert that he or she believed that the receipt of AFDC or Home Relief by his or her United States citizen or permanent resident dependents would affect his or her eligibility for legalization." Defendants shall forthwith provide copies of this Order to: (1) all INS personnel involved in accepting legalization applications in New York State; (2) all qualified designated entities in New York State; (3) all INS personnel involved in any aspect of deportation proceedings in New York State; (4) all immigration judges who preside over deportation proceedings in New York State; (5) all plaintiff class members who, during the effective period of this Order: (a) are issued an order to show cause for deportation; (b) are offered, or request, a "waiver of deportation and consent to voluntary departure"; (c) come before an immigration judge within the context of a deportation proceeding; or (d) are about to be deported. Defendants agree to stay the deportation of any alien for the pendency of this Order whose United States citizen or legal permanent resident dependents receive or have received AFDC or Home Relief and who can otherwise demonstrate prima facie eligibility for temporary resident status under 8 U.S.C. § 1255a.

ORDERED, that no person shall acquire any rights by virtue of this Order or any action taken pursuant hereto beyond the date of argument of this appeal.

/s/ James L. Oakes
JAMES L. OAKES,

/s/ Lawrence W. Pierce
LAWRENCE W. PIERCE, Circuit Judges

APPENDIX I

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

No. 88 Civ. 2265(KC).

CESAR PERALES, ET AL., PLAINTIFFS,

v.

EDWIN MEESE, III, ET AL., DEFENDANTS.

MEMORANDUM OPINION AND ORDER

KENNETH CONBOY, District Judge:

The Government has taken steps to meet plaintiffs' principal complaint: a lack of clearly disseminated standards governing the "public charge" regulations of the Immigration and Naturalization Service, with particular reference to the narrow circumstances in which receipt of AFDC benefits by members of a family unit are relevant to eligibility of an applicant for legalization under the Immigration Reform and Control Act of 1986 ("IRCA").

Specifically, the Service has today promulgated to all regional and district legalization offices, and all Qualified Designated Entities approved to accept legalization applications throughout the nation, definitive instructions and criteria that are not inconsistent with the advice of INS Counsel, its Assistant Commissioner, William S. Slattery, and its Associate Commissioner, Richard E. Norton, set forth and referred to at various points throughout plaintiffs' papers and exhibits.

For the present, the Court finds it unnecessary to grant the relief sought in the application for the Temporary Restraining Order. The hearing on the preliminary injunction

sought in this action is scheduled for April 25, 1988, eight days prior to the statutory expiration of the application period for legalization under IRCA. If the plaintiffs prevail at any subsequent stage of this litigation, the Court possesses equitable power to toll the expiration of the statutory time limit to preserve any rights of plaintiffs frustrated by ambiguous procedures. Furthermore, Congress is, according to both parties, considering an extension of the May 4 deadline, which might obviate the need for the preliminary relief sought by plaintiffs. Additionally, the Government has not yet had the opportunity to respond to the voluminous papers of the plaintiffs under the briefing and submission schedule agreed to by all the parties. Finally, the plaintiffs' own proof indicates some doubt as to the effectiveness of a media campaign designed to communicate prior to May 4, 1988 to the immigrant population at large the substance of today's INS advice to its agents and QDEs. It is, therefore, apparent that plaintiffs do not now face irreparable harm, and accordingly, the relief sought in the application for a Temporary Restraining Order is denied.

SO ORDERED.

/s/ Kenneth Conboy
U.S.D.J.

Dated: New York, New York

April 19, 1988

ON MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs' motion for a preliminary injunction is in all respects denied. No showing has been made that plaintiffs will be irreparably injured if the relief sought is not granted at this stage of the litigation.

The core of this dispute involves the effect of receipt of public assistance to families with dependent children (AFDC) upon the determination by the Immigration and

Naturalization Service (INS) that an applicant is or is not likely to become a public charge, a crucial disqualification factor under the law. The regulations in question have been on the books since May 1, 1987, and the INS has taken steps to substantially clarify their "public charge" meaning in three phases: the November 23, 1987 memorandum of Commissioner Richard E. Norton,[1] the February 10, 1988 letter of Assistant Commissioner William S. Slattery, and the April 21, 1988 memorandum of Commissioner Norton. The INS is also attempting to locate applicants who were erroneously excluded under the more restrictive "public charge" standard.[2]

It is now clear that persons who may have been disqualified after having applied, or were discouraged from applying by qualified designated entities (QDEs)--which function as quasi-governmental agencies under IRCA--may now have a wholly new basis to apply based on these clarifications. Because the government concedes that the Commissioner has authority, under conventional administrative powers, to find that constructive filing has occurred with respect to such applicants after the expiration of the amnesty period on May 4, 1988 (see minutes of Hearing, April 25, 1988), intervention at this time is not necessary.[3] In other words, any harm that might accrue toward plaintiffs is not irreparable.

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1 The Norton memorandum clarified INS' position only with respect to the receipt of Supplemental Security Income by an applicant's immediate family members.

2 These steps, taken voluntarily by the INS, conform substantially to the preliminary relief imposed by the court in *Ayuda v. Meese*, ---F.Supp. ----, slip op., No. 88-0625 (D.D.C. March 30, 1988).

3 The Commissioner has already effectively extended the May 4, 1988 deadline for applicants who file skeletal

Nor is there a need for immediate relief with respect to a third category of possible plaintiffs who may not have had any direct contact with the INS or with a QDE, but who could, after expiration of the amnesty period, demonstrate that their dependant American national children received AFDC, and that they decided not to apply on the basis of reading or being apprised of the controlling regulations, which ambiguity is conceded by the Commissioner requiring promulgation of the clarification with only weeks left in the program. Plaintiffs in this category, upon an adequate showing of injury, may be the subject of subsequent remedial relief under the doctrine of equitable tolling. E.g. *Bowen v. City of New York*, 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986); In the *Matter of Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal.1975). Accordingly, no irreparable harm has been demonstrated with respect to any prospective member of the class that would justify entry of injunctive relief, especially in light of the fact that Congress has under active consideration extension of the amnesty period beyond May 4, 1988. Indeed, the Court notes that the House of Representatives has voted to approve legislation extending the filing deadline, and this bill is presently receiving active consideration in the United States Senate.

The Court further notes that although it has had this matter under consideration for 25 days and has conducted three hearings, no witnesses have been called to support the plaintiffs' case. Furthermore, the Court observes that the three anonymous individual plaintiffs whose affidavits have been submitted have adequate time to submit applications prior to May 4, and have been adequately apprised of their rights (see the Court's order dated April 19, 1988). Finally, it should be emphasized that evidence, by affidavit, of the

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applications before May 4, and for applicants who give approval to QDEs to forward their application to the INS.

dimension and character of the class sought to be certified is largely speculative and generalized.

The Court concludes that the rights of all parties can be adequately protected through a systematic and fact oriented trial on the merits, followed by the exercise of the administrative authority of the Commissioner and the equitable power of the Court if the record justifies it.

SO ORDERED.

/s/ Kenneth Conboy
U.S.D.J.

Dated: New York, New York
April 26, 1988

APPENDIX J

5 U.S.C. §§ 702, 704, 706

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of theUnited States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1255a(a)

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period
Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

. . . .

(4) Admissible as immigrant
The alien must establish that he--
(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

. . . .

(b) Subsequent adjustment to permanent residence and nature of temporary resident status
(1) Adjustment to permanent residence
The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) of this section to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

. . . .

(C) Admissible as immigrant
The alien must establish that he--
(i) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section, and
(ii) has not been convicted of any felony or three or more misdemeanors committed in the United States.

8 U.S.C. § 1255a(c)

(c) Applications for adjustment of status
(1) To whom may be made
The Attorney General shall provide that applications for adjustment of status under subsection (a) of this section may be filed--
(A) with the Attorney General, or
(B) with a qualified designated entity, but only if the applicant consents to the forwarding of the application to the Attorney General. As used in this section, the term

"qualified designated entity" means an organization or person designated under paragraph (2).
(2) Designation of qualified entities to receive applications
For purposes of assisting in the program of legalization provided under this section, the Attorney General--

(A) shall designate qualified voluntary organizations and other qualified State, local, and community organizations, and
(B) may designate such other persons as the Attorney General determines are qualified and have substantial experience, demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 209 or 245, Public Law 89-732 [8 U.S.C.A. s 1255 note], or Public Law 95-145.

8 U.S.C. § 1255a(d)(2)(B)(iii)

(iii) Special rule for determination of public charge
An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(4) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

8 U.S.C. § 1255a(i)

(i) Dissemination of information on legalization program
Beginning not later than the date designated by the Attorney General under subsection (a)(1)(A) of this section, the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits.